Supreme Court, U.S.
FILED
NOV 13 2000
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No. 00-789

IN THE

Supreme Court of the United States

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, and WILLIAM C. VAN BUSKIRK,

Petitioners,

v.

ASHER RUBINSTEIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions for this Court's review concerning the evidence required to prove liability and damages in a retaliation action under 42 U.S.C. § 2000e-3(a) of Title VII:

1. Whether the Fifth Circuit's opinion, which affirmed the district court's judgment applying a "mixed-motive" analysis under a separate statutory provision, 42 U.S.C. § 2000e-2(m), conflicts with decisions of other circuits holding that statute to be inapplicable to retaliation claims.

2. Whether the defendant-employer is entitled to a judgment of dismissal as a matter of law where the jury found, and objective evidence in the record conclusively reveals, that it had legitimate, non-retaliatory reasons for denying an annual raise to the plaintiff-employee, who was not entitled to receive a raise under the employer's lawful criteria.

3. Whether punitive damages are recoverable as a matter of law from an employer whom the jury found to have legitimate, non-retaliatory grounds for its employment decision.

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Petitioners, The Administrators of The Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk, respectfully ask this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion, No. 98-30777, is reported as *Rubinstein v. Administrators of Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000), and reprinted in Appendix A hereto. The relevant orders and reasons, jury verdict, judgment, and post-judgment order of the United States District Court for the Eastern District of Louisiana that were the subject of the Fifth Circuit's review are reprinted in Appendices B through G. The district court's Order and Reasons for its partial summary judgment dated March 6, 1998 (Appendix F) is reported as *Rubinstein v. Administrators of Tulane*, 58 F. Supp. 2d 702 (E.D. La. 1998), but its other rulings (Appendices B through E) are unpublished.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its judgment on July 6, 2000 and denied the parties' timely petitions for panel rehearing and *en banc* rehearing on August 14, 2000. *See* Appendix H at pp. 104a-105a, *infra*. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1981a(b)(1), 42 U.S.C. § 2000e-2(m), 42 U.S.C. § 2000e-3(a), and 42 U.S.C. § 2000e-5(g)(2)(B). The pertinent texts of these federal statutory provisions are set forth in Appendix I at pp. 106a-109a, *infra*.

STATEMENT OF THE CASE

A. Proceedings Below

Asher Rubinstein, an Associate Professor of Mechanical Engineering at Tulane University, sued Tulane (his employer), Paul Michael Lynch (his Department Chair), and William C. Van Buskirk (his Dean) in the United States District Court for the Eastern District of Louisiana, alleging that the defendants had discriminated against him on the basis of his national origin and religion as a Russian Jew and had retaliated against him in violation of Title VII and Louisiana law (R.1, 272-77). Jurisdiction vested in the district court under 28 U.S.C. § 1331 (federal question jurisdiction) and § 1367 (supplemental jurisdiction).

After the district court granted partial summary judgments of dismissal (Appendices E and F), Rubinstein's sole remaining claim under Title VII asserted that the defendants had denied him a pay raise for the academic year 1997-98 in alleged retaliation for his protected activity of filing an EEOC charge and a lawsuit. Although Tulane presented summary judgment evidence that it had valid, non-discriminatory reasons for the raise denial and that Rubinstein had failed to come forward with evidence from which a reasonable jury could find that Tulane would not have taken the same action despite any alleged retaliatory motive, the district court refused to dismiss the claim. *See* Appendix D. The court concluded that even if Tulane "had several legitimate, non-discriminatory motives for denying plaintiff a pay raise . . . that fact alone would not bar the availability of all relief to the plaintiff if the plaintiff were to prove that one motive was retaliatory." *Id.* at p. 41a. Although Rubinstein relied on 42 U.S.C. § 2000e-3(a), which

prohibits employers from discriminating against employees who file EEOC claims, the court looked to 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), which afford limited recovery to an employee who demonstrates that discrimination motivated the employer's practice even though other factors motivated it as well. *Id.* at pp. 39a-40a. The court stated that "the limited remedies available in Sections 2000e-2(m) & 2000e-5(g)(2)(B) apply with equal veracity to retaliation claims." *Id.* at p. 41a.

The case proceeded to trial. Over Tulane's objections, the district court instructed the jury on a "mixed-motive" analysis under 42 U.S.C. § 2000e-2(m) and 2000e-5(g)(2)(B) and submitted a jury verdict form to that effect.[1] *See* Appendix G. The jury found that Rubinstein's filing of a discrimination lawsuit and/or EEOC charge was a motivating factor in Tulane's decision to deny him a pay raise in 1997-98, that Tulane also had a legitimate, non-retaliatory motive for the raise denial, and that Tulane would not have made the same decision to deny Rubinstein a raise despite the existence of a retaliatory motive. *Id.* at pp. 101a-102a. The jury awarded Rubinstein $2,500.00 in lost wages and benefits, zero recovery for emotional damage, and

1. The transcript of the district court's jury charges and Tulane's objections to the instructions and interrogatories are missing from the record. But based on the parties' suggested jury instructions and the district court's verdict form, the Fifth Circuit assumed that the district court had given a mixed-motive charge to the jury and that Tulane had objected. The court's reliance on a mixed-motive theory under 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B) is likewise evident from its pretrial ruling denying Tulane's motion for summary judgment (Appendix D), and the judge's statement on the record during trial that she was overruling Tulane's objections to the proposed charges "for the reasons assigned in the order and reasons of two weeks ago." (Tr. Vol. III, p. 468).

$75,000 in punitive damages. *Id.* at pp. 102a-103a. After entering judgment (Appendix C), the district court denied defendants' motions for judgment as a matter of law and new trial, granted Rubinstein's motion to alter or amend, and ordered Tulane to instate a 3.5% increase in his salary (Appendix B).

On appeal, the Fifth Circuit affirmed the district court's discovery rulings, summary judgment, denial of emotional damages, jury instructions and interrogatories, and denial of Tulane's motion for judgment as a matter of law (Appendix A). But the court of appeals reduced the $75,000 punitive damage award to $25,000 and remanded that issue alone to the district court to give Rubinstein an opportunity either to accept the remittitur or to proceed to a new trial solely on the issue of punitive damages. *Id.* On August 14, 2000, the Fifth Circuit denied defendants' and plaintiff's timely applications for panel and *en banc* rehearing. *See* Appendix H. Rubinstein has since elected to accept the remittitur, and the court has stayed further proceedings pending the outcome of this writ petition.

B. Statement of Facts

In a memorandum to the faculty in advance of raise decisions for the 1997-98 academic year, William C. Van Buskirk, the Dean of Tulane's School of Engineering, explained that much of the limited funds available would be used to redress "current inequities" and "address the problem . . . with the salaries of full professors and some of our associate professors" paid below the national average. *See* Appendix J, pp. 110a-111a. He cautioned that "well-paid associate professors should anticipate little or no raise." *Id.* at p. 111a. Rubinstein's salary was 5% higher than that

of the average Associate Professor of Engineering at Tulane and 9.9% above the national average, which qualified him as a "well-paid associate professor" (R.10, 2000).

Dean Van Buskirk's memo further stated that "raises will be based on merit" and would reward "high-quality performance." *See* Appendix J, p. 110a. The School's stated qualifications for promotion provide that no faculty member with marginal proficiency in teaching effectiveness will be judged favorably (R.2, 364). Rubinstein had a long history of poor teaching performance (R.10, 33, 36-37; R.11, 374-75, 380). In the prior semester, he admittedly ranked second lowest of the entire engineering faculty in teaching evaluations: "I was rated on the bottom; like, I was 51 out of 52." (R.10, 120). Citing Rubinstein's problems as a teacher, Paul Michael Lynch, the Department Chair, did not recommend a raise for Rubinstein in 1997-98 (Def. Ex. 11). He characterized Rubinstein as a "well-paid associate professor" with poor performance as a teacher, who warranted no raise in light of the restrictions on that year's pool (Supp.R. 30, 46-47).

Rubinstein had previously filed an EEOC charge against Tulane in December 1994 and this lawsuit in October 1995 alleging other claims under Title VII. As proof of the alleged retaliation against him concerning the 1997-98 raise denial, he cited Dean Van Buskirk's remark in deposition testimony in June 1997 that a "good colleague . . . uses the resources of the community to resolve differences . . . [and] doesn't haul colleagues into court. . . ." But the Dean had already sent his raise recommendation to the University Provost in April 1997, before his deposition. Moreover, as the Dean explained, in that testimony he was referring to a defamation lawsuit that Rubinstein had filed in state court against a fellow

professor without first using the University's internal grievance procedures (Supp.R., 80-84). The Dean further testified that Tulane officials had set limits on the annual raise pool for 1997-98, that Rubinstein did not receive a raise that year because the limited pool was dedicated to full professors who were compensated below average, and that Rubinstein's teaching effectiveness was in the bottom 20% of the School based on a five-year average (Supp.R. 87-88).

The Fifth Circuit recognized that Tulane had a policy to use the limited raise pool in 1997-98 to remedy pay inequities among the faculty members of the School of Engineering, that Rubinstein's salary was well above both Tulane's and the nation's averages, that merit raises were unavailable to individuals with poor teaching records, and that the record "is replete with evidence of Rubinstein's poor teaching evaluations." *See* Appendix A, pp. 5a, 11a-12a. In affirming summary judgment dismissing Rubinstein's other claims concerning earlier pay raise and promotion decisions, the Fifth Circuit stated that "Tulane's non-discriminatory purpose in denying pay raises based on Rubinstein's poor teaching skills is not rebutted," and further noted "overwhelming evidence that . . . Rubinstein received substantially lower evaluations than other, similarly situated professors." *Id.* at p. 12a.

Both Van Buskirk and Lynch categorically denied that Rubinstein's EEOC charge and lawsuit were in any way a factor in the raise decision concerning him in 1997-98 (Supp.R. 50, 88). Another associate professor of Mechanical Engineering at Tulane, who had also filed an EEOC charge and lawsuit, in fact received a 4.7% raise that year because his salary was well below the national and School averages (*id.* at 88). Nevertheless, the Fifth Circuit found that the Dean's remark in deposition was direct evidence of illegal retaliation against Rubinstein. *See* Appendix A, pp. 16a-17a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case to insure the uniformity of jurisprudence between the circuits and to uphold this Court's own evidentiary standards for proving liability and damages in cases alleging retaliation in employment under Title VII.

I. A Clear Conflict Exists Between the Circuits

Rubinstein's alleged claim for retaliation in employment arises under 42 U.S.C. § 2000e-3(a) of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating "against any of his employees . . . because he has made a charge . . . under this subchapter." Citing this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), the Fifth Circuit recognizes in its opinion that a Title VII plaintiff must prove not only that the employer's proffered reasons for its action are pretextual but also that the defendant intentionally discriminated or retaliated against him. *See* Appendix A, pp. 15a-16a. As this Court recently reiterated, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2160 (2000), *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Even where the plaintiff produces direct evidence of discrimination, the defendant is not liable for discriminatory action if it can demonstrate that the plaintiff would have suffered the same adverse employment decision based upon other legitimate, non-discriminatory reasons. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

"In order to prove a Title VII violation (and thereby recover any relief) based on retaliation, *Price Waterhouse* still requires retaliation plaintiffs to establish that the alleged discrimination was the 'but for' cause of a disputed employment action." *McNutt v. Board of Trustees of University of Illinois,* 141 F.3d 706, 709 (7th Cir. 1998).

On the other hand, a post-*Price Waterhouse* amendment to Title VII, 42 U.S.C. § 2000e-2(m), Section 107 of the Civil Rights Act of 1991, provides that a complainant establishes an unlawful employment practice by demonstrating "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *See Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994) (noting that "§ 107 responds to *Price Waterhouse* . . . by setting forth standards applicable in 'mixed motive' cases;"). Another provision, 42 U.S.C. § 2000e-5(g)(2)(B), sets forth the elements of recovery upon proof of a violation of § 2000e-2(m).

Every circuit court that has considered the issue before this case has concluded that the clear language of Section 107 precludes a court from applying the "mixed-motive" theory of § 2000e-2(m), and its corresponding remedies, to retaliation claims under § 2000e-3. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir.), *cert. denied*, 522 U.S. 914 (1997) (Section 107 amended only § 2000e-2, which prohibits discrimination based on race, religion and national origin and specifically does not mention the retaliation provision, § 2000e-3; "We thus must be guided by plain meaning, and we conclude that § 107 does not apply to retaliation cases."); *Tanca v. Nordberg,* 98 F.3d 680, 684 (1st Cir. 1996) ("[T]he mixed motive provisions of section

107 of the 1991 Act do not apply to Title VII retaliation claims brought under section 2000e-3."); *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706, 709 (7th Cir. 1998) ("Discrimination based on retaliation — prohibited separately by § 2000e-3(a) — is conspicuously absent from the list of protected categories in § 2000e-2(m)."); *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 552 n.7 (4th Cir. 1999) (citing *McNutt*, *Woodson*, and *Tanca* and noting that "[e]ach [sister circuit] relied on the absence of the term 'retaliation' in 42 U.S.C. § 2000e-2(m) for its holding. We find their logic persuasive, and therefore, join them in holding that § 107(a) of the Civil Rights Act of 1991 does not apply to retaliation claims."); *Norbeck v. Basin Elec. Power Co-Op*, 215 F.3d 848, 852 (8th Cir. 2000) (citing *McNutt*, *Kubicko*, *Woodson*, and *Tanca* and noting that "[t]he other circuits that have addressed the question have similarly relied on the plain language of the statute [42 U.S.C. § 2000e-2(m)] and declined to extend it to plaintiffs in dual motive retaliation cases. . . . We find this analysis persuasive. . . ."). *See also Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1304-05 (11th Cir. 2000) ("We hold that 42 U.S.C. § 2000e-5(g)(2)(B) does not apply to mixed-motive retaliation claims under the ADEA. . . . Retaliation prohibited by the ADEA under 29 U.S.C. § 623(d) . . . is not among the unlawful employment practices listed in 42 U.S.C. § 2000e-2(m).").

A. The District Court Erroneously Applied A Mixed-Motive Analysis Under § 2000e-2(m) to This Retaliation Claim Under § 2000e-3(a)

Despite this settled law, the district court cited § 2000e-2(m) and erroneously concluded that Rubinstein could prevail on a mixed-motive theory and recover by simply

showing that Tulane had a retaliatory motive for denying him a pay raise, even though it also had a legitimate reason for its decision:

> In the present case, defendants argue that they had several legitimate, non-discriminatory motives for denying plaintiff a pay raise. Although this may well be true, that fact alone would not bar the availability of all relief to the plaintiff if the plaintiff were to prove that one motive was retaliatory.

See Appendix D, p. 41a. As support for this approach, the district court solely relied on the reasoning of *de Llano v. North Dakota State University*, 951 F. Supp. 168 (D.N.D. 1997), which applied 42 U.S.C. § 2000e-2(m) to retaliation claims under § 2000e-3(a). *Id.* As noted above, the Eighth Circuit in *Norbeck v. Basin Elec. Power Co-Op*, *supra*, has since rejected *de Llano*'s analysis.

Even though it recognized the First, Third, and Seventh Circuits' decisions in *Woodson*, *Tanca*, and *McNutt*, cited above, which hold that the mixed-motive provisions of 42 U.S.C. § 2000e-2(m) do not apply to Title VII retaliation claims, the court of appeals declined to "decide a matter of first impression" in the Fifth Circuit upon concluding that this case did not present the issue clearly and that the district court's error, if any, was "harmless." *See* Appendix A, pp. 19a-20a. But the Fifth Circuit's refusal to correct the district court's reversible error in misapplying a mixed-motive law to this case has effectively sanctioned such an approach and has created a decision that will surely be cited for that proposition. Unless corrected, the judgments below not only adversely affect Tulane's substantial rights

in this case but pose a conflict between the circuits that is likely to recur and bedevil other litigants and courts. This case squarely presents the issue for certiorari review, and the Court should address it.

B. The Error Is Prejudicial, Not Harmless

The relevant inquiry under the harmless error standard is "whether the error itself had substantial influence" on the jury, not simply whether there was enough evidence to support the result. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995), citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). Contrary to the Fifth Circuit's view, the district court reversibly erred in misapplying the mixed-motive analysis of § 2000e-2(m). Far from being harmless, that error went to the heart of Rubinstein's burden of proof and necessarily influenced and affected the verdict in a substantial way to the prejudice of Tulane.

Despite Tulane's motion for summary judgment, suggested jury instructions and interrogatories, and objections, the district court effectively charged the jury that Rubinstein was entitled to recover in some form or another simply by proving that retaliation for filing his EEOC charge or this discrimination suit was "a" motive for Tulane to deny him a pay raise. Over Tulane's objections, the district court gave instructions and a verdict form (Appendix G) that asked the jury to decide in Interrogatory No. 1 whether "a motivating factor" for denying Rubinstein the raise had resulted from his "discrimination lawsuit and/or EEOC charge" and in Interrogatory No. 2 whether Tulane "also" had a "legitimate, non-retaliatory motive for the denial." Interrogatory No. 3 then inquired whether Tulane would have made the "same" decision to deny him a raise

"despite the existence of a retaliatory motive," instead of asking the jury whether Rubinstein had proved ultimately that he qualified for and would have received a raise without the alleged retaliation. Depending on the answer, the form instructed the jury to award damages or allow the court to assess the elements of recovery.

The hybrid, "mixed-motive"/"but-for" interrogatory form, which derived from the court's misapplication of 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), undoubtedly confused the jury about Rubinstein's burden of proof. The district court's analysis, which is at odds with the language of Title VII and the prevailing law on the issue in all the other circuits effectively relieved Rubinstein of his required burden to prove pretext and "but-for" causation under *Reeves*, *Hicks*, and *Price Waterhouse*. That error necessarily affected Tulane's "substantial rights" as a defendant in this action under Title VII within the meaning of 28 U.S.C. § 2111 and Fed. R. Civ. P. 61. At a minimum, "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos*, 328 U.S. at 765. Because at the very least "grave doubt" exists that the error did not affect the jury in this case, it is not "harmless." *Id.*

These reversible errors deprived Tulane and the other defendants of their substantial right to a fair trial based on the applicable law and changed the result. If defendants were not entitled to a dismissal as a matter of law for the reasons that follow, then alternatively they are entitled to a remand for a new trial.

II. Rubinstein's Evidence of Retaliation Was Legally Insufficient Under the Proper Legal Standard

Under Fed. R. Civ. P. 50, a court should render judgment as a matter of law on an issue when no legally sufficient evidentiary basis exists for a reasonable jury to find for a party on that issue after a full hearing. *Reeves*, 120 S. Ct. at 2109. Although it should review the entire record and must disregard evidence favorable to the moving party that the jury is not required to believe, the court should still give credence to uncontradicted and unimpeached evidence from disinterested witnesses that supports the moving party. *Id.* In a Title VII case, the relevant factors "include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." 120 S. Ct. at 2108.

To avoid judgment as a matter of law in a Title VII retaliation case, the Fifth Circuit itself recognizes that a plaintiff must first establish a *prima facie* case by showing that he engaged in a protected activity, that the employer took adverse action, and that a causal link exists between the protected activity and the adverse action. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Once the employer successfully articulates a legitimate, nondiscriminatory explanation for the alleged adverse employment action, the burden then shifts back to the plaintiff who must demonstrate **both** that "the proffered reason is a pretext for retaliation" **and** that the adverse employment action would not have occurred "*but for*" his protected conduct. *Id.* at 1122-23; *McDaniel v. Temple Independent School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985).

As a matter of law, Rubinstein failed to carry his ultimate burden of proving that Tulane's reasons for the raise denial were pretextual and that he would have received a merit raise in 1997-98 "but for" Tulane's alleged retaliation. Because objective evidence reveals that his salary was already above average and that his teaching performance was poor, Rubinstein cannot establish that he qualified for and would have received a raise that year according to Tulane's valid criteria. Under the proper legal standard, Tulane is entitled to a dismissal of his claim as a matter of law.

A. The Jury Found No Pretext

Rubinstein failed to establish that Tulane's articulated reasons for denying him a raise — salary inequities among the faculty and his demonstrable teaching mediocrity — were in any way pretextual. The jury found no such pretext, as reflected in its response to Question No. 2 on the verdict form (Appendix G, p. 102a):

> Do you find by a preponderance of the evidence that Tulane also had a legitimate, non-retaliatory motive for the denial of the 1997-98 pay raise?

The jury answered "Yes," concluding (1) that Tulane had not only articulated but indeed had proved a legitimate, non-retaliatory motive for the raise decision and (2) that Rubinstein had failed to demonstrate that the motive was pretextual. Based on those findings that the evidence amply supports, Tulane is entitled to a Rule 50 dismissal of Rubinstein's retaliation claim, because he failed to prove the pretext element of his burden of proof.

As this Court has recognized, despite a plaintiff's *prima facie* case, "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reason for the employer's decision. . . ." *Reeves,* 120 S. Ct. at 2109. Because the record conclusively reveals Tulane's non-discriminatory reasons for denying Rubinstein a raise, defendants are entitled to a judgment as a matter of law dismissing his retaliation claim.

B. Rubinstein Did Not Prove "But For" Causation

The Fifth Circuit itself has further recently reaffirmed that a retaliation plaintiff under Title VII *must* prove that the adverse employment action would not have occurred "*but for*" his protected conduct. *Vadie v. Mississippi State University*, 218 F.3d 365, 374 (5th Cir. 2000); *Long v. Eastfield College*, 88 F.3d 300, 305, n.4 (5th Cir. 1996) (emphasis supplied), *citing*, *McDaniel, supra,* 770 F.2d at 1346; *see also Sherrod, supra,* 132 F.3d at 1122-23. This burden of proof is much more stringent than the plaintiff's burden to show the "causal link" element of a *prima facie* case by demonstrating that the alleged retaliation against a protected act was a cause or a motivating factor in the employer's salary decision. *Long*, 88 F.3d at 305 n.4. To prove the "ultimate issue" of unlawful retaliation, Rubinstein must prove that "pretext" masked Tulane's alleged retaliatory animus and that he would have received a raise in 1997-98 without the alleged retaliation. *See Vadie*, cited above; *Jack v. Texaco Research Center*, 743 F.2d 1129, 1130-31 (5th Cir. 1984).

As a matter of law, Rubinstein failed to carry this burden. As explained above, the jury found that Tulane had a legitimate, non-retaliatory reason for denying Rubinstein a

pay raise for the relevant year. Tulane wanted to correct salary inequities and reward meritorious teaching. Merit raises were unavailable in 1997-98 to Rubinstein, an associate professor with an above-average salary and a poor teaching record. Rubinstein cannot insulate himself from performance standards and obtain a raise by filing a retaliation claim. *See Travis v. Board of Regents of the University of Texas System*, 122 F.3d 259 (5th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998) (noting the significance in a retaliation case where, as here, a professor's credentials are the same before the filing of the charge and at the time of the employment decision at issue). "Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers." *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir.), *cert. denied,* 488 U.S. 892 (1988).

The Fifth Circuit erroneously concluded that the jury found "but-for" causation through its negative response to Interrogatory No. 3: "Do you find by a preponderance of the evidence that Tulane would have made the same decision to deny Asher Rubinstein a raise despite the existence of a retaliatory motive?" *See* Appendix A, pp. 19a-20a. But that response has no support whatsoever in the evidence and affords Rubinstein no basis for recovery. Apart from the reversible errors discussed above that tainted the jury's finding, Rubinstein cannot prevail as a matter of law unless he proves that he would have received a raise in 1997-98 absent Tulane's alleged retaliation. As the court of appeals recognized in affirming summary judgment dismissing Rubinstein's claims concerning the earlier pay raise decisions, "Tulane's non-discriminatory purpose in denying

pay-raises based on Rubinstein's poor teaching skills is not rebutted . . . [and] Rubinstein has not established pretext as to this issue." *Id.* at 12a. Rubinstein likewise offered no evidence to challenge Tulane's legitimate raise guidelines in 1997-98 to bring underpaid professors up to average and to reward good teaching. As a well-paid associate professor with a poor teaching record, he was neither recommended for nor entitled to a raise that year.

Rubinstein likewise cannot dispute Tulane's longstanding stated policy concerning faculty promotions, which expressly provides that no faculty member with marginal proficiency in teaching will be judged favorably (R.2, 364). Moreover, in 1997-98 in particular, Tulane announced its specific aims for disbursing raises from the limited pool of funds to reward underpaid faculty members and good teachers. Rubinstein failed to meet either criterion that year, as the uncontroverted and independent documentary evidence of his existing salary and student evaluations readily show. Under these circumstances and the Rule 50 standards set forth in *Reeves*, no reasonable juror could conclude that Rubinstein proved that he would have received a raise in 1997-98 "but for" Tulane's alleged retaliation against him.

Citing *Long, supra*, the Fifth Circuit stated that "Rubinstein is correct that he does not have to prove that his 'protected conduct was the sole factor in motivating [Tulane's] challenged decision.' " *See* Appendix A, p. 19a. But the court of appeals made that statement in *Long* in discussing the plaintiff's burden "to establish the 'causal link' element of a *prima facie* case." 88 F.3d at 305 n.4. On the ultimate issue, Tulane is permitted to have multiple reasons for its action, but Rubinstein can "prevail only by proving

that 'but for' the protected activity [he] would not have been subjected to the action of which [he] claims." *McDaniel, supra*, 770 F.2d at 1346, citing *Jack, supra*, 743 F.2d at 1131.

Even assuming that Dean Van Buskirk's innocuous remark in his deposition testimony that good colleagues should use grievance procedures of the University before suing were somehow "direct" evidence of discrimination, the objective evidence still shows that Rubinstein was not entitled to a raise in 1997-98 under Tulane's valid criteria because he had an above-average salary and a poor teaching record. Whether the issue is viewed as Rubinstein's ultimate burden of proof or as Tulane's affirmative defense, under the standards of *Price Waterhouse* no rational fact finder could conclude that Tulane would not have made the same decision to deny him a raise. When the Court reads the jury's responses to all three interrogatories in light of the evidence and the proper legal standards, it can only conclude that the evidence is insufficient to support Rubinstein's claim that he would have received a raise in 1997-98 "but for" the alleged retaliation.

III. The Award of Punitive Damages is Contrary to the Controlling Law and the Evidence

This case further presents an excellent opportunity for this Court to clarify the quality and quantity of proof necessary for recovery of punitive damages in a Title VII retaliation case. The standard for awarding punitive damages under the Civil Rights Act of 1991 requires that the employer must have acted "with malice or with reckless indifference to federally protected rights" of the plaintiff. 42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999) (issued subsequent to the trial of

this case). Although this statute "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind," the "employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." 527 U.S. at 534-36. Even intentional discrimination does not give rise to punitive damages where "the employer discriminates with the distinct belief that its discrimination is lawful." 527 U.S. at 536-37. As evidenced by the jury's finding that Tulane had a legitimate, non-pretextual motive for its decision, Rubinstein completely failed to prove that defendants acted either maliciously or with reckless indifference to his protected rights by denying him a raise that he never qualified for in the first place.

First, Rubinstein did not meet the valid criteria for a raise in 1997-98. Just as he cannot immunize himself from adverse action based on lawful performance standards by filing an EEOC complaint, he cannot recover punitive damages after Tulane denied him a raise for failing to meet those requirements. Any punitive damage award unjustly rewards Rubinstein and penalizes Tulane for following its own legitimate raise guidelines.

Second, Tulane applied its raise criteria fairly and did not unlawfully discriminate against Rubinstein. Michael Lynch, the Department Chair, recommended raises based on each faculty member's individual performance according to the valid criteria and stated his reasons for those recommendations in a memorandum to the Dean (Defendants' Exhibit 11). In not recommending any raise for Rubinstein in 1997-98, the Chair specifically noted Rubinstein's poor teaching performance based on student evaluations. *Id.* Both the Dean and the Chair unequivocally

denied any retaliatory motive against Rubinstein (Supp.R., 50, 88). Indeed, in the 1997-98 academic year, the only other Tulane engineering professor who had filed an EEOC charge and lawsuit alleging discrimination actually received a raise because his salary was below average (Supp.R., 88).

Third, there is no proof of defendants' malice or reckless indifference. The Fifth Circuit erroneously attempts to justify the jury's punitive damage finding by citing Dean Van Buskirk's deposition remark that Rubinstein "hauled colleagues into court to try to resolve differences." The court of appeals refers to that as evidence of "a healthy disdain for Rubinstein's rights to seek redress in the courts" that meets "the standard of reckless indifference at least, if not outright animus, towards those rights." *See* Appendix A, pp. 26a-27a. But, as noted above, the Dean explained that he was simply referring to Rubinstein's filing of a defamation suit against a fellow faculty member instead of using the University's grievance procedures. Moreover, even when it is viewed in a light most favorable to Rubinstein, nothing in the Dean's remark justifies a punitive damage award. Indeed, under the Fifth Circuit's circular reasoning, any employer who acted adversely to an employee who had exercised a protected right would be guilty of malice and reckless indifference. Punitive damages are not recoverable in every Title VII case, and nothing about this one rises to the level of knowing and intentional violation of federal law or warrants a punitive award in any amount no matter how reduced.

Moreover, even assuming that Tulane was not entitled to judgment as a matter of law on this record under the *Kolstad* standards, defendants should be granted a new trial on both liability and damages. This case was tried before

this Court rendered its decision in *Kolstad*, and Tulane should be allowed to present evidence of its good faith efforts to comply with Title VII as *Kolstad* allows. Further, as the Fifth Circuit recently held in another Title VII case, a jury's decision on a punitive damage claim is inseparably "intertwined with its view of the facts determining liability and its award of damages for emotional injury." *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000). Here, the jury awarded Rubinstein zero damages for emotional distress, and its verdict on liability resulted from the district court's erroneous mixed-motive analysis. If defendants were not entitled to a judgment as a matter of law dismissing Rubinstein's punitive damage claim, they should be granted a new trial on all issues in the case.

Furthermore, under the mixed-motive analysis that the trial court employed, Title VII prohibits Rubinstein from recovering punitive damages. Under 42 U.S.C. § 2000e-5(g)(2)(B), a successful Section 107 "mixed-motive" plaintiff under § 2000e-2(m), who would have been subject to the same employment action despite the discriminatory motive, is entitled to recover *only* declaratory relief, injunctive relief, attorney's fees, and costs attributable to that claim, but "[the court] shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, . . ." Thus, even assuming that § 2000e-2(m)'s mixed-motive analysis applied in this case, the jury's award of punitive damages and the district court's instatement of a 3.5% pay raise to Rubinstein clearly exceed the remedial scope of Section 107. This is not a punitive damage case, and the award should be struck in its entirety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30777

ASHER RUBINSTEIN,

Plaintiff-Appellee-Cross-Appellant,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND; MICHAEL LYNCH; WILLIAM C. VAN BUSKIRK,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana

Before BARKSDALE, BENAVIDES and STEWART, Circuit Judges.

BENAVIDES, Circuit Judge:

Professor Asher Rubinstein filed a Title VII and related state-law lawsuit against Tulane University, his employer, in October, 1995, asserting several grounds for relief of discriminatory and retaliatory employment decisions made against him. The district court granted summary judgment on all claims, except a later-added claim of retaliation for

the 1997 school year. This issue was submitted to a jury and the jury awarded $2500 in compensatory damages and $75,000 in punitive damages. The district court then entered judgment for Rubinstein in the aforementioned amounts, as well as for a 3.5% raise as an equitable remedy for the retaliatory act taken by Tulane. The parties now each appeal from the adverse rulings against them.

Finding the district court's rulings correct on all but the punitive damages issue, we affirm. As we further find that the $75,000 punitive damage award is excessive, we remit the award and remand the issue to the district court so as to afford Rubinstein the opportunity for a new trial on the issue of punitive damages.

I. FACTUAL AND PROCEDURAL HISTORY

Because this appeal involves several issues of summary judgment granted in favor of the defendants, as well as a jury verdict rendered in favor of the plaintiff, we recount the facts in a light most favorable to Rubinstein's arguments so as to facilitate a review of the facts deferential to the non-movant vis-a-vis summary judgment, and deferential to the jury verdict, as rendered in favor of Rubinstein. The more notable factual disputes, however, are highlighted.

Appellee-cross-appellant Rubinstein, a Jewish man born and raised in the former USSR, ~~is~~, and was at all time relevant to this action, a tenured professor of mechanical engineering at Tulane's School of Engineering. Rubinstein achieved the rank of Associate Professor in 1990, when he was granted tenure. In Rubinstein's tenure recommendation it was noted

that he was "an outstanding researcher" and a "satisfactory teacher." It is undisputed that faculty evaluations at Tulane reference three major areas of performance: teaching, university citizenship and research. In the two years subsequent to achieving this rank, Rubinstein received raises in excess of eight percent, reflecting his outstanding research skills and contributions to the University.

Sometime in 1991, William Van Buskirk was promoted to Dean of the School of Engineering. In 1992, Paul Michael Lynch was named Department Chair of the Mechanical Engineering department. It is around this time that Rubinstein asserts the discrimination began.

Specifically, Rubinstein contends that the defendants-appellants-cross-appellees Tulane, Lynch and Buskirk (hereinafter "Tulane"), refused to grant him a raise in 1993, out of discriminatory animus directed toward his status as a Russian Jew. In support of this claim, Rubinstein references a conversation he had with defendant Van Buskirk concerning his 1993 raise, during which Van Buskirk apparently speculated that defendant Lynch might be discriminating against him because he was Russian and Jewish.

Sometime in 1993 or 1994, Rubinstein contends a senior faculty member of the mechanical engineering department, Prof. Robert Watts, began referring to Rubinstein as a "Russian Yankee" and a "commie." Apparently, around this time, Watts also began making anti-Semitic remarks, such as a comment concerning placing a propeller on a yarmulke and a remark about Jewish frugality.

Appendix A

In 1994, Rubinstein received a 2.02% raise, purportedly the lowest in the department, excluding the former dean who was about to retire. That fall, Rubinstein requested consideration for promotion to the level of Full Professor. Sometime after making this request, Rubinstein complained to Van Buskirk that he was being unfairly considered with respect to raises and promotion. Rubinstein asserts that Van Buskirk responded by inquiring: "what are you going to do, sue me? Do you know what happens to people who sue their employer?" While denying ever uttering these exact words, Van Buskirk admits he inquired into whether Rubinstein planned to file suit, expressing the opinion that it would be a bad idea. Rubinstein filed what appears to be his first of two complaints with the EEOC in December of 1994.

Rubinstein's promotion request was denied in early 1995. Although Tulane acknowledges his excellent research record, the denial was purportedly based on Rubinstein's poor university citizenship, low teaching evaluation scores, and an insufficient record in mentoring students. Rubinstein, however, insists that the evidence supports the finding that the teaching evaluations were tampered with.

Rubinstein again filed a complaint with the EEOC, in April of 1995. Shortly thereafter, it appears he again received the lowest raise in the department, of approximately 2.53%. Rubinstein filed this lawsuit on October 11, 1995, asserting claims of discrimination and retaliation in the decisions concerning his promotion and pay raise consideration.

In early 1996, Rubinstein's additional request for promotion was denied. Later that year, Tulane announced a

campus-wide policy that only Assistant Professors and newly hired Associate Professors would be eligible for raises for the 1996-97 academic year. Rubinstein does not complain about his lack of raise for this year.

The following fall, Rubinstein's request for promotion was again denied. When the time came again for raise consideration, it appears that Tulane implemented a policy designed to use the limited raise pool to remedy inequities among the faculty both internally and with reference to salaries at comparable institutions. Rubinstein did not receive a raise for the 1997-98 academic year. He contends that despite this policy, and despite the fact that his salary was well above both Tulane's average and the national average, he was denied a raise out of retaliation for filing suit. Van Buskirk admitted as much, Rubinstein maintains.

The district court granted summary judgment on all issues raised in Rubinstein's complaint and amended complaints, except the issue of retaliation concerning the refusal to grant the 1997-98 raise. The retaliation issue was submitted to a jury, and the jury returned a verdict for Rubinstein in the amount of $2500 plus $75,000 in punitive damages.[1] Both sides now appeal the adverse decisions against them.

II. ANALYSIS

Tulane and Rubinstein both assert several grounds of error, each of which will be addressed below in turn.

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1. The verdict was later amended by the district court, so as to include a 3.5% pay raise.

Appendix A

A. Scope of Discovery

From the beginning of this action, Rubinstein and Tulane have disputed the appropriate breadth and scope of discovery that should be allowed in this case. On appeal, Rubinstein maintains that the district court's decision to limit discovery to the records of the Mechanical Engineering Department constituted error. We review orders concerning discovery under a deferential abuse of discretion standard. *See Geiserman v. MacDonald*, 893 F.2d 787, 789 (5th Cir.1990); *see also Hodges v. United States*, 597 F.2d 1014, 1018 (5th Cir.1979).

The record reveals that the district court limited discovery to the records of the Mechanical Engineering department based on its finding that Rubinstein is similarly situated only to those in his department. This finding is based on evidence demonstrating that salary and initial promotion decisions are made on a departmental basis. Rubinstein maintains that this is error, as our case law requires broader discovery into university-wide tenure and promotion decisions.

The cases cited by Rubinstein in support of this contention, however, do not mandate broad discovery in all university discrimination suits. Rather, the cases stand for the proposition that discovery orders are fact-based and must be reviewed in the context of the claims at issue. Specifically, Rubinstein relies on *Travis v. Bd. of Regents of Univ. of Texas*, 122 F.3d 259 (5th Cir.1997), for the proposition that university-wide statistics are more relevant than statistics limited to plaintiff's division, as similar officials are

responsible for approving promotion decisions. However, importantly, and as Rubinstein fails to note in his brief, this Court reached this conclusion in ruling on a Rule 50 motion — not in settling a discovery dispute. *See id.* at 263. The evidence concerning school-wide practices was already admitted before the jury, and, additionally, in *Travis*, the plaintiff alleged sex-discrimination. Thus, this Court concluded, wider statistics concerning the treatment of women at the university generally were relevant to a determination concerning whether the defendant had engaged in illegal discrimination.

Here, the district court exercised its discretion properly in concluding that Rubinstein's requests for discovery concerning his claim that he was discriminated against for being Jewish and Russian did not implicate the salary and promotion decisions of the School of Engineering with regard to every foreign-born professor. The record reflects that initial promotion decisions are made on a departmental basis, followed by highly deferential, not de novo, review of these decisions by a school-wide tenure committee. Further, raise decisions are made based on the recommendation of the department chair to the Dean. Based on these pertinent characteristics which distinguish the case from *Travis*, it is clear the district court did not abuse its discretion in limiting Rubinstein's discovery requests to the Mechanical Engineering department — the relevant unit of decision-making with respect to these issues.

Rubinstein further relies on *Duke v. University of Texas at El Paso*, 729 F.2d 994 (5th Cir. 1984), to support his contention that broader discovery was both necessary and

required under the facts of his case. While this Court in *Duke* reversed a limited discovery order, reasoning that failure to allow discovery into the records of professors university-wide to substantiate a gender-discrimination claim constituted an abuse of discretion, the *Duke* decision again rests on the unique facts of the case.

In *Duke*, the plaintiff attempted to certify a university-wide class of similarly situated female professors, but was thwarted by the discovery order. Further, university-conducted, university-wide surveys indicated that women were paid less than their male counterparts. These facts, reasoned the Court, warranted further and broader discovery.

Importantly, however, *Duke* reaffirmed that this Court is "reluctant to find abuse when the trial court's discretion is as wide as it is in the superintendence of discovery. . . ." *Id.* at 997. Thus, despite Rubinstein's protestations otherwise, we do not feel compelled by our case law to order broader discovery, based alone on the fact that this is a university case. Given the district court's careful consideration of the issue, including the persuasive conclusion that any wider discovery would only be relevant to the establishment of a prima facie case — which the district court concluded was established on the record absent additional discovery — we affirm the discovery orders as entered by the magistrate judge and ratified by the district judge.

B. Summary Judgment Rulings

Rubinstein asserted several claims in the district court concerning allegedly discriminatory and retaliatory behavior

by Tulane. As the district court concluded, and as affirmed by our reading of the record, Rubinstein alleged that Tulane gave him comparatively lower salary increases than other faculty members in 1992, 1993, 1994, and 1995. Additionally, Rubinstein complained that he was denied full professorship status during this time period, due to discriminatory animus as well as a desire to retaliate. Finally, Rubinstein maintained that he did not receive a promotion or pay raise in 1997 due to retaliation.

The district court granted summary judgment on all these claims except the 1997 pay raise/retaliation claim. Rubinstein appeals from the grant of summary judgment on his 1994 and 1995 claims, as well as his promotion claim for 1997.[2]

This Court reviews a grant of summary judgment de novo. Summary judgment is proper when the evidence, viewed in the light most favorable to the non-movant, reflects no genuine issues of material fact. Fed. R. Civ. P. 56(c). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As with any appeal from a grant of summary judgement, a fact-intensive review of the record is necessary, in order to discover the evidence and reasonable inferences therefrom in favor of the non-movant's claims. We are aided in this review by the district court's carefully considered and highly detailed summary judgment orders entered on March 6, 1998,

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2. The district court dismissed the earlier claims on statute of limitations grounds as well as state law prescription grounds. Rubinstein does not appeal this aspect of the district court's ruling.

and March 20, 1998. Our review of the dismissed claims tracks the district court's analysis and reaches the same conclusion: summary judgment was proper.

The required showing to be made by any Title VII plaintiff is familiar: the plaintiff bears the burden of establishing a prima facie case of discrimination; upon such a showing, the burden shifts to the defendant(s) to articulate some legitimate, non-discriminatory reason for the challenged employment action; if such a showing is made, then the burden shifts back to the plaintiff to demonstrate that the articulated reason was merely a pretext to unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

A prima facie case may be established by a showing that the plaintiff was a member of an identifiable national origin or religion; that he was qualified for the benefit or promotion he sought; that he was denied these benefits and such denial constitutes an adverse employment decision; and that the adverse employment decision was differentially applied to plaintiff. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997).

In this case, the parties do not dispute the first or third of these requirements: Rubinstein is clearly a member of a protected class and he clearly suffered an adverse employment decision. The parties do dispute whether Rubinstein was qualified for the benefit he sought and, further, whether the adverse employment decision complained of was differentially applied to him.

Appendix A

The district court found on all Rubinstein's claims evidence of qualification and evidence of differential application, at least sufficient enough to establish a prima facie case. Likewise, the district court easily found defendants offered legitimate, non-discriminatory reasons for the employment decisions at issue: Rubinstein was a poor teacher, based on student evaluations, and therefore not entitled to the promotion he sought; furthermore, as the University lacked funds to give raises to every professor, merit based raises were unavailable to those individuals with poor teaching records; finally, Rubinstein was a poor university citizen, as evidenced by his lack of participation on committees. The record clearly supports these findings. The record is replete with evidence of Rubinstein's poor teaching evaluations, as well as faculty reviews and memoranda reflecting Rubinstein's poor teaching and inadequate mentoring of students, in addition to evidence of his lower participation rate in departmental committees. As such, we move to the third, and pivotal step in the *McDonnell Douglas* framework.

Specifically, summary judgment in this case turned on whether Rubinstein could substantiate pretext and ultimately whether he could demonstrate that discrimination lay at the heart of the complained of employment decisions. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368 (5th Cir. 1997). The district court found some evidence of pretext, specifically with regard to Rubinstein's purported lack of university citizenship. In particular, the district court concluded that, viewing the evidence in the light most favorable to Rubinstein as the non-movant, his testimony that he was thwarted in his efforts to participate in departmental

committees by Professor Lynch, by simply not being named to these committees, would tend to establish pretext. We agree that the record supports this finding.

We also agree that the record indicates that Tulane's non-discriminatory purpose in denying pay-raises based on Rubinstein's poor teaching skills is not rebutted by Rubinstein's arguments that these evaluations were not always accurate. Even if Rubinstein is correct that one or two evaluations were tampered with, the district court is correct that this does not rebut the overwhelming evidence that, even controlling for these evaluations, Rubinstein received substantially lower evaluations than other, similarly situated professors. Rubinstein has not established pretext as to this issue.

Even on the issue for which Rubinstein demonstrated some pretext, we find an overall lack of any evidence of discriminatory intent. While we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext, *see Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, *5, discrimination suits still require evidence of discrimination. On this record, Rubinstein has failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive so as to support an inference that the real reason was discrimination. In fact, the only evidence offered by Rubinstein in support of his claims of discriminatory intent relate to the comments made by Professor Watts, a member of the relevant committees

responsible for making promotion and pay-raise decisions, that Rubinstein was a "Russian Yankee" and that Jews are thrifty, as well as an isolated remark by a Professor Bruce, also a member of the relevant committees, that if "the Russian Jew" could obtain tenure, then anyone could.

These comments, standing alone, will not defeat summary judgment on Rubinstein's claims of discrimination in the promotion and pay-raise decisions. This Court held, in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), that, in order for comments in the workplace to provide sufficient evidence of discrimination, they must be "1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the [complained-of adverse employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." In this case, Rubinstein fails to offer evidence that the comments he complains of are either proximate in time to his failure to receive raises or promotions, or that the comments are related to the employment decisions at issue. The only evidence he offers is that the comments were, in fact, made. Our careful review of the record indicates that these comments are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment.[3] *See Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). Summarized, our careful review of all the

3. Rubinstein references a few other comments made by various members of the faculty concerning women and other minority groups. Many of these comments are ambiguous at best in their meaning, and, in any event, inapplicable to the case at bar, as they do not relate to the protected class of which Rubinstein is a member.

summary judgment evidence presented, viewed in the best light to the non-movant's claims, mandates the conclusion that the evidence taken together does not raise a legitimate fact issue as to discriminatory intent with respect to Rubinstein's discrimination claims.

Rubinstein further appeals from the district court's grant of summary judgment on his remaining retaliation claims. These claims apparently relate to his lack of pay raise in 1995, and the refusal to promote after 1994. However, the district court, in its second Order and Reasons partially granting summary judgment concludes that the only evidence of retaliation presented concerns Tulane's failure to grant him a pay-raise in 1997. Given that Rubinstein compresses these issues and speaks generally to the district court's error in granting summary judgment on his retaliation claims, we review them together, as did the district court, and we similarly conclude that, as discussed above, Rubinstein presented no evidence of discrimination or retaliation with respect to the earlier pay raise and promotion decisions. Accordingly, we affirm the grant of summary judgment on all issues presented by Rubinstein.

C. Motion for Judgment as a Matter of Law

At the conclusion of the trial, Tulane moved for judgment as a matter of law (JMOL). The district court denied this motion and Tulane appeals.

This Court reviews a district court's denial of a motion for judgment as a matter of law de novo. *See Travis v. Board of Regents of the Univ. of Tex. Sys.*, 122 F.3d 259, 263 (5th

Cir.1997). "A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.1997) (internal quotations and citation omitted). This Court tests jury verdicts for sufficiency of the evidence under the standards set forth in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc), overruled on other grounds, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997) (en banc). Under *Boeing*, we consider "all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting [judgment as a matter of law] is proper." *Id.*

As discussed above, this Court applies the burden-shifting framework expounded by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to retaliation cases. However, we need not now parse the evidence into discrete segments corresponding to a prima facie case, an articulation of a legitimate, nondiscriminatory reason for the employer's decision, and a showing of pretext. "When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* ritual is unimportant." *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir.1993) (citation omitted). A Title VII plaintiff bears the burden of proving not only that the employer's purported

reasons for taking an adverse employment action are pretextual, but also that the employer engaged in illegal discrimination or retaliation. *Hicks*, 509 U.S. at 511. Thus, applying *Boeing*'s sufficiency of the evidence standards, this Court must examine whether the plaintiff has met his ultimate burden of proving that the adverse employment action complained of resulted from retaliatory intent.

Again, we note the Supreme Court's recent admonition to the Courts of Appeals sitting in review of jury verdicts in such cases: "Under Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue'. . . . It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves*, 2000 WL 743663, *10 (citation omitted). The jury made several findings in this case: first, the jury found by a preponderance of the evidence that Rubinstein's filing of a discrimination lawsuit and/or EEOC charge was a motivating factor in Tulane's decision to deny his pay raise in 1997-98; second, the jury found by a preponderance of the evidence that Tulane also had a legitimate, non-retaliatory motive for the denial of the 1997-98 pay raise; and, third, the jury found by a preponderance of the evidence that Tulane would not have made the same decision to deny his raise absent the existence of a retaliatory motive.

In this case, Rubinstein testified that Dean Van Buskirk, in depositions taken pursuant to this lawsuit, stated clearly that he denied Rubinstein a raise in 1997 because Rubinstein

filed suit, a step Van Buskirk apparently believes good colleagues do not take. Van Buskirk, also testifying at trial, confirmed that his deposition testimony corresponded to Rubinstein's account, although he attempted to distance himself from the full meaning of these comments. We find that this evidence, clearly presented at trial and viewed with reference to the entire trial record, could be no more direct on the issue of retaliation. As such, the jury was presented with more than sufficient evidence from which to conclude that Tulane illegally retaliated against Rubinstein.

In addition to complaints concerning the sufficiency of the evidence, the defendants complain at length about the nature of the jury interrogatories and resultant findings. Specifically, they challenge the consequences of these jury findings to this Court's requirement that Title VII retaliation plaintiffs prove that *but for* retaliation, the adverse employment action would not have occurred. *See Long v. Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996). The parties seem to agree that the "but for" test is required by this Circuit's precedent. *See id.* ("The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision" (citing *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir.1985))). In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct. *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1131 (5th Cir.1984).

Tulane, thus, complains that the application of mixed-motive law to the facts of this case tainted the jury's findings and mandates reversal, given the above requirement in retaliation cases that the plaintiff prove but-for causation. The dispute is thus: The district court apparently concluded that 42 U.S.C. § 2000e-2(m) (Section 107), and the corresponding remedial provision, apply to Rubinstein's retaliation claim. This section allows for limited remedies in cases where plaintiffs are able to prove that one motive for the adverse employment action is discrimination, even when the defendant is able to prove that the action would have been taken in the absence of the discriminatory motive. These amendments were passed by Congress in the wake of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case in which the Supreme Court held that all discrimination plaintiffs must prove that but for the discriminatory intent, the adverse employment decision would not have been made.

This Circuit has not had opportunity to address the question of whether the amended statute applies in retaliation cases. The district court in this case determined that it does, while three circuit courts have reached the contrary result. *See McNutt v. Board of Trustees of Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932-36 (3d. Cir.), *cert. denied*, 118 S.Ct. 299 (1997); *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir.), *cert. denied*, 117 S.Ct. 1253 (1997). Tulane now asserts that error resulted from the district court's consideration of this issue in instructing the jury and drafting the jury interrogatories.

Rubinstein, not surprisingly, disagrees as to the consequences of the district court's application of this

reasoning in drafting the jury interrogatories in this case. Tulane emphasizes the second jury finding: Tulane had a legitimate, non-retaliatory motive for the denial of the pay raise at issue.[4] However, their discussion fails completely to reference the third finding: Tulane would not have made the complained of adverse employment decision in the absence of the retaliatory motive. Rubinstein is correct that he does not have to prove that his "protected conduct was the sole factor in motivating [Tulane's] challenged decision." *Long*, 88 F.3d at 305. All that is left for us to determine is whether the jury verdict is supported by sufficient evidence, under the test outlined above. As we have already concluded that it does, the verdict on retaliation will be allowed to stand.

Thus, we respectfully decline the invitation to address this issue now. Simply stated, this is not the case to decide a matter of first impression, when it is not clearly presented

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4. The three relevant jury interrogatories were:

> 1. Do you find by a preponderance of the evidence that Asher Rubinstein's filing of a discrimination lawsuit and/or EEOC charge was a motivating factor in Tulane's decision to deny Asher Rubinstein a pay raise in 1997-98?
>
> 2. Do you find by a preponderance of the evidence that Tulane also had a legitimate, non-retaliatory motive for the denial of the 1997-98 pay raise?
>
> 3. Do you find by a preponderance of the evidence that Tulane would have made the same decision to deny Asher Rubinstein a raise despite the existence of a retaliatory motive?

and it is unnecessary to our decision on the issues before us. Whether error or not, the error was certainly harmless, given the jury's explicit finding of but-for causation pursuant to interrogatory three. The district court's understanding of mixed motive analysis may have resulted in a jury interrogatory form that was over-extensive (so as to determine the multiple reasons underlying the adverse employment action in question), but ultimately the jury rejected the option of returning a verdict based on mixed motive and instead found that absent the retaliatory motive, Rubinstein would have received his raise.

D. Jury Instructions and Interrogatories

Tulane next complains that the jury instructions[5] and jury interrogatory forms were improper because they allowed the jury to consider mixed motive analysis.

Challenges to jury instructions are reviewed to determine whether the court's charge, as a whole, is a correct statement of the law and clearly instructs jurors on the legal principles at issue. *See United States v. Moreno*, 185 F.3d 465, 476 (5th Cir.1999). Further, and importantly to this case, review of jury instructions is for harmful error. Even if an instruction erroneously states the applicable law or provides insufficient

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5. As Tulane notes in its brief, the jury instructions are not preserved on appeal, as apparently the transcript of the charging conference has been misplaced. However, we can infer from the instructions submitted by the parties and the jury interrogatories the nature of the disputed instructions, given that Tulane's concern focuses on the application of mixed-motive law to the retaliation claim in this case.

guidance, this Court will not disturb the judgment unless the error could have affected the outcome of the trial. *See Arleth v. Freeport-McMoran Oil & Gas Co.*, 2 F.3d 630, 634 (5th Cir.1993); *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 377 (5th Cir.1989). This Court affords district courts great latitude in framing and structuring special interrogatories and reviews the formulation of jury interrogatories for abuse of discretion. *EEOC. v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir.1994).

Tracking our discussion of this issue above, we will assume, arguendo, that the district court abused its discretion, by misapplying the law, in instructing the jury on mixed motive. However, as stated, this error was harmless, in that the jury made an explicit finding as to "but for" causation. As such, this issue does not require reversal.

E. Punitive Damages

The jury awarded Rubinstein $75,000 in punitive damages upon answering in the affirmative interrogatory 5, which asked: "Do you find by a preponderance of the evidence that Tulane acted with malice or with reckless indifference to the rights of Asher Rubinstein in denying him a pay raise in 1997-98?" Tulane argues that this award of punitive damages is contrary to controlling law and specifically the Supreme Court's opinion in *Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999), decided subsequent to the trial in this case. Rubinstein counters that such an award is authorized by statute and well within reason on the facts of this case.

Appendix A

Prior to 1991, Title VII provided no authority for an award of punitive or compensatory damages. *See Landgraf v. USI Film Products*, 511 U.S. 244, 252-253 (1994). With the passage of the 1991 Act, however, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and Americans with Disabilities Act violations. These awards are limited, however, to cases of "intentional discrimination." There is no dispute that this is such a case.

The availability of punitive awards, however, is further qualified: "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a. The Supreme Court has stated that the very structure of this amendment "suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination." *Kolstad v. American Dental Ass'n*, 119 S.Ct. at 2124. "Congress plainly sought to impose two standards of liability — one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." *Id.*

Under this reading of the relevant statute — the Supreme Court's reading — the employee must demonstrate that the employer acted with "malice or with reckless indifference" to appellant's federally protected rights.

Our inquiry, however, does not end there. Rather, the employee must satisfy an additional requirement as set out in this recent articulation of the necessary showing to obtain punitive damages under Title VII: the requirement of agency. Relevant to this case, the evidence must support a finding that the malfeasing agent served in a "managerial capacity" and committed the wrong while "acting in the scope of employment." *Kolstad*, 119 S.Ct. at 2127.

We begin our analysis, however, by considering the consequences of the final consideration required, as articulated in *Kolstad* — what might be termed application of the good-faith exception. In *Kolstad*, the Supreme Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decision of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' " *Id.* at 2129. In this case, Rubinstein's evidence of retaliation concerns comments made by the Dean of his department about the consequences of filing suit against Tulane. Tulane argues, relying on *Kolstad*, that whether it can properly be held responsible for these comments, and the retaliatory result of these comments, depends on whether Tulane made a good-faith effort to comply with Title VII. It further contends that, as it has made such an effort, punitive damages are forbidden by *Kolstad*.

We disagree for the simple reason that Tulane presented no evidence at trial, and the record as a whole offers no evidence, to establish Tulane's efforts to comply with Title VII. However, as *Kolstad* was decided subsequent to the jury trial in this case, we consider the effect of applying the ruling in *Kolstad* to a previously rendered jury verdict.

Appendix A

Following the decision in *Kolstad*, this Court had opportunity to consider the consequences of retroactively applying the good-faith language on a punitive damages award in a Title VII case. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278 (5th Cir. 1999). In *Deffenbaugh-Williams*, the jury returned a verdict for the plaintiff which included a $100,000 punitive damages award upon a finding that Wal-Mart had discriminated against the plaintiff based on her race with malice or with reckless indifference to her federally protected rights.[6] The district judge granted Wal-Mart's motion for judgment as a matter of law (JMOL) with respect to the punitive damages, relying on *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (discussing in detail the depth of management participation required to sustain an award of punitive damages). An appeal was taken and a panel of this Court affirmed the liability finding and the award of compensatory damages, while reversing the post-verdict JMOL on punitive damages, although a remittitur was ordered. 156 F.3d 581, 586-91 (5th Cir. 1998).

The Supreme Court subsequently granted certiorari in *Kolstad*. As such, this Court, en banc, granted rehearing and ordered briefing on the punitive damages question. After *Kolstad* was rendered in June of 1999, the en banc Court remanded to the panel the punitive damages question. It is this remanded opinion that guides our decision today.

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6. The punitive damages award was previously reduced to $75,000 by the panel upon the initial hearing of the case, *see* 156 F.3d 581, 594-98 (5th Cir. 1999), a reduction which was subsequently upheld on remand from the en banc court. *See Deffenbaugh-Williams*, 188 F.3d at 286.

Tulane maintains that this is not a punitive damages case, in light of *Patterson* and *Kolstad*, and, as such, the punitive damages award should be vacated by this Court. We are convinced, however, as was the *Deffenbaugh-Williams* panel, that Tulane was on notice "that faithfully-adhered-to non-discrimination polic[ies] may bar imputing punitive damages liability to an employer when its employee acts with malice or reckless indifference," and thus cannot now claim the benefit of this newly clarified standard in requesting a new trial or other remedies. *Deffenbaugh-Williams*, 188 F.3d at 283. "In short, *Kolstad*'s imputation holding was not such a sudden shift as to require, in fairness, giving [Tulane] an opportunity to present additional evidence." *Id.* at 284. Therefore, we will consider Tulane's motion for judgment as a matter of law, with respect to punitive damages, by applying *Kolstad*, in full to the record before us, without concern that our retroactive application is unfair.[7]

In the first instance, we must determine whether the retaliatory act at issue was committed by a managerial agent acting within the scope of employment. Tulane does not seriously contest this issue and we find easily, based on the record, that Dean Van Buskirk, the agent primarily

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7. As we noted in *Deffenbaugh-Williams*, "[t]his conclusion is consistent with post-Kolstad opinions from other courts, none of which have required a new trial under its standards after a jury considered the issue pre-Kolstad." *See, e.g.*, *Kimbrough v. Loma Linda Development*, 183 F.3d 782, 784 (8th Cir. 1999) (affirming punitive damage award); *Blackmon v. Pinkerton Sec. & Investigative Services*, 182 F.3d 629, 636 (8th Cir. 1999) (reversing district court's JMOL on punitive damages and remanding for reinstatement, finding, inter alia, employer's remedial response inadequate).

responsible for ratifying the decision not to grant Rubinstein a raise, was acting within the scope of his employment in making this decision. As the record reflects, it is ultimately the dean of each department at Tulane who is responsible for entering any pay-raise decisions. In this case, the Dean of the Engineering Department, Van Buskirk, refused to grant Rubinstein a raise. Without question, this decision was made in his capacity as a managerial agent and in the scope of his employment.

Kolstad instructs that we must next consider whether the bad act complained of was committed with malice or with reckless indifference to the complainant's federal rights. As we know now, from *Kolstad*, plaintiffs are not required to make an additional showing of egregiousness. *Kolstad*, 119 S.Ct. at 2129 ("We have concluded that an employer's conduct need not be independently 'egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.") Thus, Tulane's insistence to the contrary must fall on deaf ears.

Rather, we will only search the record for evidence that Tulane's agent was motivated by malice or reckless indifference to Rubinstein's federal rights. We find, on the trial record, Rubinstein made such a showing. The evidence indicates that Dean Van Buskirk denied Rubinstein a raise because he "hauled colleagues into court to try to resolve differences." Whatever else this evidences, it certainly indicates a healthy disdain for Rubinstein's rights to seek redress in the courts for perceived wrongs adequate to meet the standard of reckless indifference at least, if not outright

animus, towards those rights. The jury was well within its purview to so find, and we will not disturb this finding on appeal.

Finally, as noted earlier, Tulane has not presented and the record does not reflect any evidence of its good-faith efforts to comply with Title VII. As our analysis above leads us to conclude that Tulane had ample notice and opportunity to do so, we will not allow Tulane to raise this issue for the first time on appeal. As such, this is an impotent defense to the award of punitive damages and we will not disturb the award of those damages on this record.

Our inquiry, however, cannot end here. While we conclude without controversy that Rubinstein is entitled to an award of punitive damages on the facts of this case, we must nevertheless pause to consider Tulane's arguments that the amount of the award is excessive. The jury awarded Rubinstein $2500 in compensatory damages for lost wages and benefits and the jury awarded nothing for emotional damage. The jury then awarded $75,000 in punitive damages. Tulane insists that this award is grossly excessive and requests that we either vacate the award, grant a new trial, or, alternatively, grant a remittitur on the punitive damages issue.

Tulane moved for judgment as a matter of law at the conclusion of the trial. The judge denied this motion without comment or opinion. Accordingly, we review this claim, applying the usual standard, as articulated above.

Relying primarily on our decision in *Patterson*, Tulane maintains that the award of punitives in an amount thirty

times the award of compensatory damages is excessive and "close to the line" of constitutional propriety. Rubinstein counters that given the reprehensibility of the conduct at issue, the award, in equity, of a 3.5% pay raise, and the comparable nature of this award to others in this Circuit, the amount is within the realm appropriate for such a case.

In the original panel opinion in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998), this Court extensively discussed the appropriate appellate approach to assessing a punitive damages award.[8] *See id.* at 594-98.

As in that case, Rubinstein does not respond in his brief to Tulane's request that we either remit or remand the award of punitives. As in that case, Tulane mentions primarily in passing that the award of $75,000 exceeds the Constitutional limit as prescribed by the Due Process Clause. As in that case, the parties rely on a three-tiered analysis provided by *Patterson* and the Supreme Court's opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), without acknowledging that *BMW* concerned the constitutional limits of a punitive damages award, not statutory or otherwise. As in that case, this matter was tried to a jury and yet the parties fail to acknowledge that *Patterson* concerned a bench trial, raising different and fewer Seventh Amendment considerations. Finally, as in that case, the parties fail to

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8. As we detailed above, the panel opinion was taken en banc, then reinstated except for the punitive damages issue. The panel subsequently issued an opinion which adopted its former reasoning with respect to the amount of punitive damages the law would allow. *See Deffenbaugh-Williams*, 188 F.3d at 285.

fully develop the numerous considerations that must underlie an application of *BMW*'s standards for assessing the Constitutionality of a punitive damages award.

Thus, we find the reasoning of *Deffenbaugh-Williams* instructive on the issue of excessiveness, given the critical similarities between these cases, and we apply its reasoning in toto, and similarly conclude that a more fully developed approach to assessing the Constitutionality of a punitive damages award awaits a future day. In so doing, we agree with the *Deffenbaugh-Williams* court that special consideration must be given to Rubinstein's failure to respond to the remand or remit issue. He simply offers us no guidance as to whether if we deem the award excessive he is entitled to a new trial on this issue, or whether, as an alternative, we should remit the award or leave it to the district court for further consideration. As the *Deffenbaugh-Williams* court stated, "efficiency and economy for the parties and the courts" dictate that we settle this issue now, on appeal, rather than through further proceedings in the district court. 156 F.3d at 597.

The first factor to consider and " '[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendants's conduct.' " *Deffenbaugh-Williams*, 156 F.3d at 597 (quoting *BMW*, 517 U.S. at 575). This case concerns one act of retaliation. Rubinstein was denied a pay-raise of approximately 3.5% as a result of seeking redress for perceived acts of discrimination. The record indicates that the decision-maker responsible for setting Rubinstein's raise punished him for exercising his rights, in an act of certain

ill-will towards Rubinstein. Tulane argues, however, that the record supports, and the jury also found, that other reasons existed for Rubinstein's lack of pay-raise. While this may be true, it does nothing to undermine our conclusion that the act of the Dean in expressly acknowledging that he was undertaking what should be a performance-based employment decision on the basis of an employee's exercise of his federal rights is sufficient to demonstrate a high degree of reprehensibility under the first *BMW* factor.

The second factor to consider is whether the punitive damages bear a reasonable relationship to the compensatory damages awarded. *See Id.* We bear in mind, in applying this factor, that this court has not and indeed cannot " 'draw a mathematical bright line between [ ] constitutionally acceptable and [ ] constitutionally unacceptable' " levels of punitive damages " 'that would fit every case.' " *Id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)). " 'We can say, however, that general concerns of reasonableness . . . properly enter into the constitutional calculus.' " *Id.* Thus, we are required to consider the disparity between the harm suffered by the plaintiff and the punitive damages awarded.

While no bright line exists, this award is clearly outside even the gray areas of the demarcation between acceptable levels of damages and unacceptable levels. While we acknowledge Rubinstein's arguments that he was awarded a 3.5% pay raise in addition to $2500 in compensatory damages, we cannot fairly consider this award in weighing the appropriateness of the punitive damages awarded. The pay-raise is prospective relief to correct a wrong previously

committed, while the punitive damages award is properly the tool used to correct the retrospective harm. Accordingly, we must consider the appropriateness of the amount at issue here with reference only to the compensatory damages awarded for the prior harm.

As previously stated, the punitive damages awarded were in an amount thirty times the compensatory damages. While there is no magical multiplier, a multiplier of thirty is unreasonable on the facts of this case. Rubinstein, while no doubt, and understandably, frustrated and angry as his testimony indicates, did not lose his tenured position at the University, nor was he demoted or otherwise forced to suffer consequences to his status at the university. We find that the employment decision denying Rubinstein a small percentage raise, while illegally made, was not so exceptional as to justify a multiplier of thirty. On the facts of this case the ratio alone of thirty-to-one is so disproportionate as to "raise a suspicious judicial eyebrow," and require a remittitur. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting).

Having found that the award fails to satisfy the second requirement, we need not examine the third prong of the *BMW* test.

Thus, our application and analysis of the *BMW* factors to the record in this case, as outlined and applied in *Deffenbaugh-Williams* in the context of a non-constitutional challenge to punitive damages, compels our finding that the punitive damages awarded by the jury were excessive. The award is high when considered against the harm to be

remedied. As such, we remit the damages to $25,000. While we acknowledge that this remittitur leaves the award at a level ten times the compensatory damages, we note that the Supreme Court has indicated that a ratio of ten to one does not necessarily " 'jar one's constitutional sensibilities.' " *TXO*, 509 U.S. at 462 (quoting *Haslip*, 499 U.S. at 18.) Moreover, when considered as an absolute amount as opposed to a comparative ratio, we find that a $25,000 punitive damages award is reasonable given the illegal conduct by the Dean, admitted to on the record and found by the jury to constitute malicious or reckless indifference to Rubinstein's federal rights. Such an award is appropriate in this case and does not test the boundaries of the Due Process Clause.

F. Compensatory Damages

Rubinstein additionally complains on appeal that the jury erred in refusing to award him compensatory emotional damages. We do not agree.

In this case, the only evidence submitted to the jury concerning Rubinstein's emotional state resulting from the 1997 pay-raise denial is Rubinstein's own testimony that he was angry and moody as a result of not receiving a raise.[9]

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9. Specifically, in response to a question from counsel concerning his mental state, Rubinstein stated:

> Well, it made me very upset, very angry. It's like, basically, I'm trying to do everything I am told to do. . . . It's like you get a feeling like you're standing in front

(Cont'd)

However, as this Court has noted "[h]urt feelings, anger and frustration are part of life." *Patterson*, 90 F.3d at 940. As no other evidence was offered to establish the emotional impact of this retaliatory act, we find no error in the jury's decision not to award Rubinstein compensatory emotional damages.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's rulings on discovery, summary judgment, emotional damages, jury instructions and interrogatories, and Tulane's motion for judgment as a matter of law. We further reduce the amount of punitive damages awarded from $75,000 to $25,000, and REMAND this issue alone to the district court to afford Rubinstein an opportunity either to accept the remittitur, in which case the district court shall grant it and enter judgment accordingly, or refuse it, in which case the district court shall grant a new trial solely on the issue of punitive damages.

AFFIRMED; REMITTITUR OF PUNITIVE DAMAGES; REMANDED.

(Cont'd)

> of the world, you do everything possible, you want to believe that here is somewhere some kind of fair evaluation. You want to do anything possible to overcome this, and no matter what you do, you don't get anywhere; you get another wall. The wall keep [sic] on getting higher and higher, no matter how you approach it. That's the feeling. It makes me very angry, very upset about it. . . . It make [sic] me moody at home.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED JUNE 29, 1998 AND FILED JUNE 30, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF TULANE, ET AL.

ORDER

Considering the memoranda of counsel and the applicable law, IT IS ORDERED that Plaintiffs' Motion to Alter and Amend Judgment (Doc. #124) in the above captioned matter be and hereby is GRANTED. Accordingly, IT IS ORDERED that the judgment entered by the court on April 13, 1998, be and hereby is amended to include the following:

> The defendants are hereby ORDERED to instate a 3.5% raise in plaintiff's pay.

IT IS FURTHER ORDERED that judgment entered by the court on April 13, 1998, which erroneously states that judgment is entered against "the defendants, Administrators of the Tulane Educational Fund and William Lynch &

William C. Van Buskirk, in their official capacities" is amended to state that judgment is entered against "the defendants, Administrators of the Tulane Educational Fund and Paul Michael Lynch & William C. Van Buskirk, in their official capacities."

IT IS FURTHER ORDERED that Defendants' Motion for Judgment as a Matter of Law (Doc. #128) be and hereby is DENIED.

IT IS FURTHER ORDERED that this court will retain jurisdiction to determine an appropriate award of attorney's fees and costs.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney's Fees (Doc. #126) be and hereby is referred to the United States Magistrate Judge for a Report and Recommendation pursuant to Section 636(b)(1)(B) of Title 28 of the United States Code.

New Orleans, Louisiana, this 29 day of June, 1998.

s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED APRIL 13, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF TULANE, ET AL.

JUDGMENT

This action came on for trial before the Court and the Jury on March 30, 31, April 2, & 3, 1998. The issues having been duly tried and the Jury having answered verdict form propounded by the Court; **accordingly,**

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, Asher Rubinstein, and against the defendants, Administrators of the Tulane Educational Fund and William Lynch, & William C. Van Buskirk, in their official capacities, in the amount of $2,500.00 for lost wages and benefits, and $75,000.00 for punitive damages, with interest to run from the date of judgment, and for all costs of these proceeding.

Appendix C

New Orleans, Louisiana, this 13 day of April, 1998.

s/ Mary Ann Vial Lemmon
UNITED STATES DISTRICT
JUDGE

APPENDIX D — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED MARCH 26, 1998 AND FILED MARCH 27, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF TULANE, ET AL.

ORDER AND REASONS

Considering the memoranda of counsel and the applicable law, IT IS ORDERED that defendant's Motion for Summary Judgment or Alternatively, in Limine in the above captioned matter be and hereby is DENIED for the following reasons.

In its last Order and Reasons (Doc. #100), this court held that plaintiff presents evidence from which a reasonable jury could find that defendants denied plaintiff a requested pay raise in retaliation for his filing the present suit. Defendants request summary judgment on the plaintiff's remaining retaliation claim. Defendants argue that even if plaintiff has presented evidence that defendants had a retaliatory motive in failing to give plaintiff a pay raise, plaintiff has failed to present evidence from which a

reasonable jury could find that defendant would not have taken the same action despite the retaliatory motive.

In *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), a Title VII gender discrimination case, the United States Supreme Court determined that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Price Waterhouse*, 109 S.Ct. at 1786. Thus, where a defendant has mixed-motives in taking an action, a defendant may avoid liability by proving that it would have taken the adverse employment action regardless of the unlawful motive. Courts have applied the mixed-motive analysis established in *Price Waterhouse*, a discrimination case, to retaliation cases brought pursuant to Section 2000e-3 of Title 42 of the United States Code.[1] Congress partially "overruled" *Price Waterhouse*, by subsequently enacting Sections 2000e-2(m) and 2000e-5(g)(2)(B) of Title 42 of the United States Code. Section 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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1. *See Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039-41 (2d Cir. 1993); *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 468 (3d Cir.), *cert. denied*, 114 S.Ct. 186 (1993), *overruled on other grounds*, *Miller v. CIGNA Corp.*, 47 F.3d 586, 596 n.8 (3d Cir. 1995); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470-71 (10th Cir. 1992).

Appendix D

Section 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —
>
> > (I) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
> >
> > (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Thus these sections provide that in discrimination claims, a plaintiff may recover limited remedies if she is able to prove that a motive for her employer's adverse employment action was discrimination, even when the defendant is able to prove that it would have taken the same action despite the discriminatory motive. Prior to the enactment of these sections, *Price Waterhouse* provided that a defendant's proof that it would have taken the same action, despite the discriminatory motive, serves as a complete defense to liability.

Appendix D

Since the enactment of these sections, courts have split on whether these sections extend the limited remedies available in a mixed-motive discrimination claim with equal veracity to mixed-motive retaliation claims. The First and Third Circuits of the United States Court of Appeals have held that they do not. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3rd Cir. 1997) *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996); *see also Riess v. Dalton*, 845 F. Supp. 742, 744-45 (S.D.Cal. 1993). Several district courts have held that they do. *See, e.g., Llano v. North Dakota State Univ.*, 951 F. Supp. 168, 170 (D.N.D. 1997); *Hall v. City of Brawley*, 887 F. Supp. 1333, 1345 (S.D.Cal. 1995); *Jones-Bell v. Illinois Dep't. of Social Security*, No. 95C948, 1995 WL 692321, at *8 (N.D.Ill. Nov. 20, 1995). The Fifth Circuit has not decided the issue. This court is persuaded by the reasoning contained in the later set of cases and therefore, for the reasons best expressed in *Llano*, joins these courts in holding that the limited remedies available in Sections 2000e-2(m) & 2000e-5(g)(2)(B) apply with equal veracity to retaliation claims.

In the present case, defendants argue that they had several legitimate, non-discriminatory motives for denying plaintiff a pay raise. Although this may well be true, that fact alone would not bar the availability of all relief to the plaintiff if the plaintiff were to prove that one motive was retaliatory. In any case, whether retaliation was the determinative reason for defendants' actions, only a motivating factor, or no factor at all is a question for the jury to decide. It suffices to note at this stage of the litigation that plaintiff has presented evidence from which that jury could find that retaliation was a motivating factor, if not a

determinative one, and therefore summary judgment is not appropriate.

Defendants also seek a pretrial order excluding evidence and barring plaintiff from making certain references. These issues are best dealt with in the context in which they arise and therefore, defendant's motion in limine is denied as premature.

New Orleans, Louisiana, this 26 day of March, 1998.

s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED MARCH 20, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF TULANE, ET AL.

ORDER AND REASONS

Considering the memoranda of counsel and the applicable law, IT IS ORDERED that defendant's Motion for Reconsideration (Doc. #99) in the above captioned matter be and hereby is GRANTED in part and DENIED in part for the following reasons.

In its previous Order and Reasons (Doc. #94), this court granted summary judgment in favor of defendants on all of plaintiff's federal-law and state-law national origin and religious discrimination claims and on all of plaintiff's federal-law and state-law claims, including both discrimination claims and retaliation claims, against defendants Paul Michael Lynch and William C. Van Buskirk in their individual capacities. The court denied summary judgment on plaintiff's federal-law and state-law retaliation claims against Tulane and against Paul Michael Lynch and

William C. Van Buskirk in their official capacities. The court based its denial of summary judgment on plaintiff's retaliation claims on the plaintiff's presentation of the deposition testimony of Professor Van Buskirk which contains the following exchange regarding the refusal to give plaintiff a pay raise for the 1997-98 year:

Q: And I take it that there are some negative aspects of his performance for that year that you considered?

A: Yes.

Q: And can you tell me what the negative aspects are that you considered in making that recommendation?

A: Well, in the Fall of '96 he got the worst teaching evaluations in the school, reverting to form. And, in my opinion, he's a very poor university citizen.

Q: And what actions or failure to act regarding university citizenship did you take into account?

A: I've tried to convey in my deposition this concept we have of a community of scholars. Citizenship refers to one's membership in that community. In asking whether someone is a good citizen, you ask the question: Is that person a colleague? A good college has

certain characteristics which I think Professor Rubinstein fails to exhibit.

A colleague, when disturbed by another colleague's remarks is to go to that person in private and talk it through and say: I don't know if you're aware of this, but what you're saying hurts my feelings, and I wish you would be more sensitive about that. He doesn't have a lawsuit about it.

A good colleague who's part of a community uses the resources of the community to resolve differences. He doesn't use external resources. He doesn't haul colleagues into court to try to resolve differences.

A good colleague doesn't lead his attorney down a path of systematically destroying his relationships with his colleagues in the department with these invidious distinctions and comparisons.

. . . .

All of that suggests to me that he is a very poor university citizen.

(Deposition of William C. Van Buskirk attached as exhibit 10 to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at pp. 229-30). This exchange was immediately preceeded by the following:

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Q: . . . . Have you made your decisions yet on the raises for '97-98?

A: I've made my recommendations, yes.

Q: I take it they haven't been finalized yet by the provost?

A: Well, they're in the process — The budget is in the process of being approved, but it is my understanding that as far as salary is concerned have been accepted.

Q: Do you recall what the raise is for Professor Rubinstein?

A: Yes.

Q: And what is that?

A: Zero.

. . . .

Q: Does your recommendation of zero percent for Professor Rubinstein reflect any consideration of his performance? Was that part of the reason why you're recommending zero?

A: Yes.

Id. at 227-29.

Appendix E

Thus, plaintiff presents evidence from which a reasonable jury could find that defendants denied plaintiff a requested pay raise in retaliation for his filing the present suit. This deposition testimony refers only to a denial of a requested pay raise and not to the denial of promotion to full-professorship. Plaintiff fails to present any evidence that he was denied a promotion to the position of full-professor in retaliation for filing the present suit. Accordingly, defendants are entitled to summary judgment on plaintiff's claim that he was denied a promotion in retaliation for his filing the present suit. However, for the reasons previously discussed in this court's Order and Reasons, defendants are not entitled to summary judgment on plaintiff's claim that he was denied a pay raise in retaliation for his filing the present suit. Therefore, as this court has now granted summary judgment on all of plaintiff's claims involving his denial of promotion to a full-professorship, the only remaining issue for trial is whether plaintiff was denied a pay raise in retaliation for his filing the present suit.

New Orleans, Louisiana, this 20 day of March, 1998.

s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED MARCH 6, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF TULANE, ET AL.

ORDER AND REASONS

Considering the memoranda of counsel and the applicable law, IT IS ORDERED that defendant's Motion for Summary Judgment (Doc. #52) in the above captioned matter be and hereby is GRANTED in part and DENIED in part, and that plaintiff's Objection to Magistrate's Order (Doc. #68) be and hereby is DENIED. The court assigns the following reasons for its rulings.

I. BACKGROUND

Plaintiff Asher Rubinstein filed suit in October 1995 against the Administrators of the Tulane Education Fund ("Tulane") and Paul Michael Lynch and William C. Van Buskirk, in their individual and official capacities. Plaintiff, an associate professor in the Department of Mechanical

Engineering, a department of the School of Engineering, at Tulane University, alleges that these defendants gave him comparatively lower salary increases than other faculty members in June 1992, June 1993, June 1994, and June 1995. Plaintiff also alleges that these defendants denied him a full professorship and refused to allow him to participate fully in the school's affairs. Plaintiff claims that these decisions were made on the basis of his religion and his national origin. Plaintiff also alleges that his requested salary increase in 1997 was denied in retaliation for his having filed this suit. Plaintiff alleges that defendants' actions are proscribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 and by Louisiana Revised Statutes 23:1006, 51:2242 & 51:2256. Plaintiff has filed an Objection to Magistrate Judge's Order in which he seeks review of an order of the magistrate regarding discovery of certain items. Defendants have filed a Motion for Summary Judgment in which they seek summary judgment on all of plaintiff's claims.

II. OBJECTION TO MAGISTRATE JUDGE'S ORDER

A. *STANDARD OF REVIEW*

A magistrate judge's pretrial discovery order may be reversed by a district judge if the order is clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Unless the district court finds that there was clear error in the magistrate's ruling, that ruling will not be set aside or modified. *See, e.g., Western Atlas Int'l, Inc. v. Advantic, Inc.* Civil Action No. 96-0513, 1997 WL 732419 at *1 (E.D.La. 1997) (Berrigan, J.).

Appendix F

B. *MAGISTRATE JUDGE'S ORDER*

Plaintiff seeks review of the magistrate judge's refusal to compel discovery of several items. Before this case was transferred to this court, plaintiff filed a Motion to Compel Discovery Requests (Doc. #9), in which the plaintiff sought to compel the defendants to produce several items. Among these requests, were the following:

> *REQUEST NO. 20:*
> Produce any promotion files and third year review files related to professors in the School of Engineering in the last five years, including but not limited to any files relating to Reda Bakeer.
>
> *REQUEST NO. 21:*
> Produce any documents or communications related to the grant of tenure and promotion of Reda Bakeer.
>
> *REQUEST NO. 22:*
> Produce any documents indicating the salary history of all faculty members (including faculty members holding administrative positions) in the College of Engineering since 1987.

The magistrate judge granted the plaintiff's Motion to Compel, at least to the extent that plaintiff's motion sought to compel production of the documents in Request Nos. 20, 21 and 22, stating:

> REQUESTS NOS. 19, 20, 21 & 22 — GRANT, SUBJECT TO A MUTUALLY ACCEPTABLE

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PROTECTIVE ORDER TO PROTECT PRIVACY INTERESTS OF NON-PARTIES HEREIN.

Defendants filed a Motion for Review of the Magistrate's Order (Doc. #17), in which defendants requested that the district court reverse the magistrate judge's granting of plaintiff's Motion to Compel to the extent that it required production of the documents sought in Request Nos. 20 & 22. The presiding district judge vacated the magistrate judge's order which required production of the documents sought in Request No. 20, stating:

> The court **VACATES** the Magistrate Judge's ruling on this request, and the court **DENIES** the request because it calls for the production of documents pertaining to professors who are not similarly situated to plaintiff.
>
> To the extent that this request would encompass documents pertaining to the Mechanical Engineering Department, the request is duplicative of Request Number 19.[1]

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1. Request No. 19 asked for production of:

> . . . any and all promotion files and third year review files related to faculty members in the Mechanical Engineering Department in the last 10 years.

The magistrate judge granted the plaintiff's request that the defendants be compelled to produce the documents sought in this request, and the district court affirmed the magistrate judge's ruling.

See Order at p. 4 (Doc. #25) (footnote added). The district judge also amended the magistrate judge's order, which required production of the documents sought in Request No. 22, stating:

> Defendants claim that the Magistrate Judge's Order granting this request fails to restrict the salary information to those similarly situated to plaintiff. Further, Defendants argue they should not be required to produce "any' document indicating salaries but that due to confidentiality concerns, a list of the salary histories since 1992 would be reasonable.
>
> The court now **AMENDS** the Magistrate Judge's Order to *limit* the production of requested documents to *a "list" of the salary history pertaining to mechanical engineering professors*; however, the court declines to limit the time period, as proposed by Defendants.

See Order at pp. 4-5 (Doc. #25) (emphasis in original).

Plaintiff subsequently filed a Motion to Reconsider Prior Discovery Rulings and to Compel Response to Discovery Requests (Doc. #55), in which plaintiff requested, among other things, that the magistrate judge compel the defendants to produce the documents sought in Request No. 20. Plaintiff argued that depositions of defendants' witnesses after the district court's ruling revealed that the documents sought in Request No. 20 are relevant because the criteria for promotion are uniform throughout the School of Engineering and therefore plaintiff is in fact similarly situated with other

professors throughout the School of Engineering. Plaintiff also reiterated its request for an order compelling production of the documents sought in Request No. 21.

The magistrate judge issued an order which granted plaintiff's request in part and denied plaintiff's request in part, stating:

> **DENIED in part**; as to motion to compel school-wide discovery due to reversal of the Magistrate Judge's prior order that would have allowed discovery beyond the Mechanical Engineering Department of the School of Engineering. The District Judge's ruling has become the law of the case and we cannot overrule same.

See Order (Doc. #61). Plaintiff has now filed an Objection to Magistrate Judge's Order in which he requests that this court reverse the magistrate judge's rulings and compel defendants to respond to Request Nos. 20, 21 and 22.

Although the magistrate was correct in concluding that he could not overrule the district judge's prior ruling, the "law of the case" doctrine does not necessarily bind this court from revisiting the previously presiding district judge's ruling in this case.[2] Moreover, the plaintiff's discovery

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2. Recently, in *Agostini v. Felton*, 117 S.Ct. 1997 (1997), the Supreme Court discussed the "law of the case doctrine," stating:

> Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation.

(Cont'd)

requests are premised on a need for discovery which allegedly arose subsequent to the district court's previous decision. Therefore, the law of the case doctrine does not apply to the plaintiff's discovery requests to the extent that these requests are based on newly discovered needs. In sum, the previous district judge's orders relating to plaintiff's discovery requests do not restrict this court's ability to rule on plaintiff's current requests.

Plaintiff argues that subsequent discovery reveals that the criteria for promotion and tenure are uniform throughout the School of Engineering; therefore, the documents sought

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(Cont'd)

> *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618, n.8, 103 S.Ct. 1382, 1391, n.8, 75 L.Ed.2d 318 (1983).

Agostini, 117 S.Ct. at 2017. Thus, the law of the case doctrine does not always compel adherence by a transferee judge to issues previously decided in a case by a transferor judge. As one commentator has noted:

> . . . the law of the case doctrine is not a limit on a court's power to reconsider issues once decided. Instead, it is only a convenient means of expressing the practice that courts employ of generally refusing to reopen settled issues.

John R. Knight, *The Law of the Case Doctrine: What Does it Really Mean?*, Fed.Bar.News, October 1996, at 2.

in Request No. 20, the promotion files and third year review files of all of the professors in the School of Engineering for the past five years, should be discoverable. Plaintiff notes that these documents may reveal that other associate professors were promoted despite having student teaching evaluations comparable to those of plaintiff. Plaintiff also argues that this subsequent revelation, coupled with the plaintiff's belief that Reda Bakeer was discriminated against on the basis of his national origin (which differs from plaintiff's), indicates that the documents sought in Request No. 21, the promotion and tenure file of Reda Bakeer, should be discoverable. Finally, plaintiff argues that William C. Van Buskirk, Dean of the School of Engineering, in his subsequent deposition, articulates as one of the reasons for failing to give plaintiff the raise he sought for the 1997-98 academic year was that plaintiff's salary was inordinately high for an associate professor. Thus, plaintiff argues that the basis of comparison for concluding that plaintiff's salary was inordinately high must have been school-wide rather than department-wide because the only other associate professor in the Mechanical Engineering Department has only been with that department for two years while plaintiff has been with the department for ten years. Accordingly, plaintiff argues that the salary history for all faculty members in the School of Engineering since 1987 should be discoverable.

To the extent that plaintiff's requests seek information regarding differential treatment between himself and others throughout the School of Engineering, this evidence would be relevant only to establishing plaintiff's prima facie case of discrimination. As discussed more fully below, the court

holds that plaintiff meets his burden of presenting a prima facie case of discrimination but fails to fulfill his other burdens. Therefore, this requested discovery is not relevant nor likely to lead to the discovery of relevant evidence.[3] Moreover, to the extent that plaintiff's requests seek information regarding possible discrimination against another professor on the basis of national origin, but not on the basis of the same national origin as the plaintiff, the evidence which plaintiff seeks to discover would also be irrelevant. For these reasons, and in light of the policy expressed by the magistrate and the previously presiding district judge of protecting the privacy interests of others in the School of Engineering, this court overrules plaintiff's objections to the magistrate's rulings.

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3. Federal Rule of Civil Procedure 26(b)(1) governs the general scope of discoverable material, stating:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Appendix F

III. MOTION FOR SUMMARY JUDGMENT

A. *STANDARD OF REVIEW*

A party is entitled to summary judgment upon a showing that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992); Fed. R. Civ. Proc. Rule 56(c). In making its determination as to whether summary judgment is appropriate, the Court must draw all justifiable inferences in favor of the non-moving party. *Anderson*, 106 S.Ct. at 2513; *Oliver Resources PLC v. International Finance Corp.*, 62 F.3d 128, 130 (5th Cir. 1995). To oppose a motion for summary judgment, the non-movant cannot rest on mere allegations or denials but must set forth specific facts showing that there is a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986); *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 184 (5th Cir. 1995); Rule 56(e). A material fact is any fact "that might affect the outcome of the suit under the governing law." *Anderson*, 106 S.Ct. at 2510. If the opposing party bears the burden of proof at trial, the moving party does not have to submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

Appendix F

B. *PRESCRIPTION AND STATUTE OF LIMITATIONS*

1. *STATE LAW CLAIMS*

Defendants argue that plaintiff's state law discrimination claims have prescribed as to defendants' refusal to award plaintiff an increase in pay during the years 1992, 1993, and 1994.[6] The one-year prescription period set forth in Louisiana Civil Code Article 3492 applies to discrimination actions brought pursuant to Louisiana Revised Statute 23:1006. *See Williams v. Conoco, Inc.*, 860 F.2d 1306, 1307 (5th Cir. 1988); *Bustamento v. Tucker*, 607 So.2d 532, 541 (La. 1992). In the present case, plaintiffs' state law discrimination claims brought pursuant to Louisiana Revised Statute 23:1006 which were based on pay decisions made in June of 1992, June of 1993, and June of 1994, prescribed before the plaintiff filed his complaint in October of 1995. Accordingly, defendants are entitled to summary judgment on plaintiff's state law claims for refusal to award an increase in pay in 1992, 1993 and 1994.

2. *FEDERAL LAW CLAIMS*

Defendants argue that plaintiff's federal law discrimination claims that defendants' refused to award plaintiff an increase in pay during the years 1992 and 1993 are barred by the applicable statute of limitations.[7] A party

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6. Plaintiff's Memorandum in Opposition to the defendants' Motion for Summary Judgment fails to address defendants' prescription argument.

7. Plaintiff's Memorandum in Opposition to the defendants' Motion for Summary Judgment fails to address defendants' prescription argument.

alleging a violation of Title VII of the Civil Rights Act of 1964 must file a complaint with the Equal Employment Opportunities Commission ("EEOC") within 180 days from when the alleged discriminatory act occurred, or within 300 days from this act if the forum state in which the claim is brought is a "deferral" state.[6] 42 U.S.C. § 2000e-5(e)[7]

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6. A deferral state is a state in which state law prohibits discrimination and a state agency exists for the purpose of granting relief for such discrimination. *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 n.1 (5th Cir. 1988). The Louisiana Commission on Human Rights is a state agency charged with these types of duties and has been funded and in operation since April of 1996. LSA R.S. 51:2233 (West Supp. 1997); G. Gaudry, *Employment Discrimination Claims in Louisiana*, 45 La.B.J. 240, 241 (Oct. 1997). Although the Fifth Circuit has not yet held that Louisiana is a "deferral" state, it has applied the 300 day statute of limitations in cases applying the laws of the state of Texas, which has a similar state agency. *See Urrutia v. Harlene Energy Corp.*, 841 F.2d 123, 125 (5th Cir.), *cert. denied*, 109 S.Ct. 82 (1988).

7. This section provides in relevant part:

> (e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; limitation upon commencement of action
>
> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful

(Cont'd)

Appendix F

Plaintiff's federal law discrimination claims brought pursuant to Title VII of the Civil Rights Act of 1964, which were based on pay decisions made in June of 1992 and June of 1993, were filed with the EEOC in December of 1994 — outside of the prescribed timeframe for filing a complaint. Accordingly, defendants are entitled to summary judgment on plaintiff's federal law claims for refusal to award an increase in pay for 1992 and 1993.

(Cont'd)

> employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Appendix F

C. *NATIONAL ORIGIN AND RELIGIOUS DISCRIMINATION CLAIMS*

Defendants seek summary judgment on plaintiff's federal and state-law national origin and religious discrimination claims. Louisiana Revised Statute 23:1006 prohibits discrimination on the basis of national origin and religion. Louisiana generally looks to federal precedent interpreting federal discrimination laws to interpret its discrimination laws.[8] Accordingly, the viability of plaintiff's state law discrimination claims are premised on the viability of plaintiff's federal law discrimination claims.

In order to prevail in a discrimination claim under Title VII of the Civil Rights Act of 1964, a plaintiff must present a prima facie case of discrimination. Because no one test can fully cover all of the different types of discrimination which are forbidden by Title VII and the different contexts in which claims of discrimination arise, the prima facie case a plaintiff must establish in a discrimination claim varies somewhat with the facts of each case. *See Texas Dep't. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093-94 n.6 (1981). In setting forth the elements of a prima facie case of discrimination, courts generally use as a model the elements of the prima facie case set forth in *Burdine*, a case involving an allegation of racially discriminatory hiring. In *Burdine*, the Court noted that to establish a prima facie case of racially discriminatory hiring, a plaintiff must establish:

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8. *See Branch-Hines v. Hebert*, 939 F.2d 1311, 1317 (5th Cir. 1991); *Bennett v. Coroon & Black Corp.*, 517 So.2d 1245, 1246 (La. App. 4th Cir.), *writ denied*, 520 So.2d 425 (La. 1988).

(1) that he belongs to a racial minority;

(2) that he applied and was qualified for a job for which the employer was seeking applicants;

(3) that, despite his qualifications, he was rejected;

(4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Burdine, 101 S.Ct. at 1089, 1093-94 n.6; *see also McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973).

In the present case, plaintiff claims that the defendants failed to grant him a full-professorship and failed to increase his pay on the basis of his national origin and religion. To establish a prima facie case, plaintiff must present evidence that:

(1) he was a member of an identifiable national origin or religion;

(2) he was qualified for the benefits or promotion he sought;

(3) he was denied these benefits or this promotion and this denial constituted an adverse employment decision; and

(4) the adverse employment decision was differentially applied to plaintiff.

Once a plaintiff presents this prima facie case, defendant has the burden to produce a legitimate non-discriminatory reason for its actions. *E.g.*, *Messer v. Meno*, 130 F.3d 130, 137 (5th Cir. 1997). Plaintiff then bears the burden of establishing that the defendant's proffered reason is pretextual and, ultimately, that the defendant discriminated on an unlawful basis. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747-48 (1993).[9]

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9. The parties dispute the evidentiary standards to be applied in Title VII cases in the university setting. Defendants preface their legal arguments in their Memorandum in Support of their Motion for Summary Judgment with quotes from the Fifth Circuit cases of *Dorsett v. Board of Trustees for State Colleges & Univ.*, 940 F.2d 121 (5th Cir. 1991), and *Berry Schs. v. NLRB*, 627 F.2d 692 (5th Cir. 1980), to the effect that universities are to be afforded deference in their employment decisions. (Defendants' Memorandum in Support of its Motion for Summary Judgment at p. 12). The plaintiff vehemently opposes defendants' alleged suggestion that the standard burden shifting analysis outlined above does not apply with equal vigor in the university setting. The court recognizes that the Fifth Circuit made the following statement in *Dorsett*, a case involving a claim of retaliatory harassment in violation of proscriptions of the First Amendment:

> Of all fields that the federal courts " 'should hesitate to invade and take over, education and faculty appointments at [the university] level are probably the least suited for federal court supervision.' " *Smith v. University of North Carolina*, 632 F.2d 316, 345 & n.26

(Cont'd)

(Cont'd)

(4th Cir. 1980) (quoting *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974)).

Dorsett, 940 F.2d at 124. The court also recognizes that the Fifth Circuit made the following statement in *Berry Schools*, a case involving a claim of unfair labor practices:

> Taking into account the non-industrial nature of a college or university, the Board, in interpreting the facts de novo, and this Court, on review, must give some deference to the discretion of the administration in determining who among the ranks of associate professors will achieve the distinct honor of full professorship.
>
> . . . .
>
> This Court does not sit as a reviewing body of the correctness or incorrectness of the Board of Regents' decision in granting or withholding tenure. This is founded on the policy that federal courts should be loathe to intrude into internal school affairs.

Berry Schools, 627 F.2d at 705-706 (omission added). To the extent that defendants intend to rely on these statements as somehow making the evidentiary burdens more deferential for defendants in the university setting, the court notes that these statements are taken out of context from cases not directly involving Title VII claims and therefore do not change the burden shifting analysis set forth above. Accordingly, the court notes that the burden shifting analysis set forth above does indeed, as plaintiff asserts, apply with equal vigor in the context of university employment decisions, despite whatever policy considerations might weigh in favor of a more deferential standard in an academic setting.

Appendix F

1. *PRIMA FACIE CASE*

The parties do not dispute that plaintiff belonged to an identifiable religion, Judaism; he was of a recognizable national origin, Russia; and he suffered an adverse employment decision. The parties dispute whether plaintiff was qualified for a full professorship and an elevated increase in salary and whether the denial of these benefits was differentially applied to plaintiff — the second and fourth elements of plaintiff's prima facie case.

a. *Qualification*

Defendants argue that plaintiff has failed to present evidence that he was qualified for the benefits he sought, the rank of full professor and an elevated increase in pay, because he was not performing his duties with the level of proficiency necessary to justify the awarding of these benefits. In *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940 (8th Cir. 1994), the United States Court of Appeals for the Eighth Circuit noted that to establish the second element of a plaintiff's prima facie case of discrimination, a plaintiff need not disprove any alleged conduct violations, but need only establish that he had the requisite qualifications for the position he holds. *Davenport*, 30 F.3d at 944. In *Davenport*, a plaintiff filed suit against his former employer alleging that his former employer declined to renew his contract of employment on the basis of his race. *Id.* at 942-43. The employer countered that it declined to renew plaintiff's contract on the basis of several conduct violations committed by the defendant. *Id.* In discussing the qualification element of the plaintiff's prima

facie case of discriminatory discharge under Title VII, the court stated:

> On the second element, which the district court referred to as "adequate job performance," the district court considered the four alleged infractions which defendant cited as grounds for denying plaintiff's contract renewal; because plaintiff did not dispute the fact that the alleged incidents occurred, the district court apparently concluded that plaintiff had failed to make a sufficient showing on the second element. This determination by the district court was analytically flawed for several reasons. First, recognizing that the prima facie case in discrimination cases varies somewhat with the specific facts of each case, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 n.6, 101 S.Ct. 1089, 1093-94 n.6, 67 L.Ed.2d 207 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 & n.13, 93 S.Ct. 1817, 1824 & n.13, 36 L.Ed.2d 668 (1973) (McDonnell Douglas)), we believe that the second element in the present case should have been phrased in terms of whether plaintiff was "qualified" for his position. *See, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, __, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) (in race discrimination case, for unlawful demotion and discharge, plaintiff established second element of prima facie case by showing that he was qualified for the position); *Hase v.*

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Missouri Div. of Employment Sec., 972 F.2d 893, 896 (8th Cir. 1992) (Hase) (in age and gender discrimination case, for unlawful failure to promote, plaintiff established second element by showing she met the minimum qualifications for the position). Second, by requiring plaintiff to disprove the alleged conduct violations in order to establish his prima facie case, the district court essentially required plaintiff, at the outset, to disprove defendant's alleged business reasons for its adverse employment action — in other words, to prove pretext and the ultimate issue of intentional discrimination. The prima facie burden is not so onerous. *See Johnson v. Arkansas State Police*, 10 F.3d 547, 551 (8th Cir. 1993) (threshold of proof necessary to make a prima facie case is minimal and district court improperly conflated prima facie case with ultimate issue). Third, taken to its logical extreme, the district court's reasoning could have ended the inquiry prematurely, thus denying plaintiff the opportunity to show that, even if these incidents did occur, defendant unlawfully responded by treating plaintiff differently from others who were similarly situated, on account of his race. We hold that plaintiff did show that he was qualified for the teaching and coaching positions which he had held for several years, and that he therefore met his burden of establishing the second element of his prima facie case, at least to the extent necessary to withstand a motion for summary judgment.

Id. at 944. Although the *Davenport* case is not binding authority, it is persuasive authority and the reasoning contained therein is sound. Accordingly, for purposes of this Motion for Summary Judgment, the plaintiff need not present evidence that he was actually performing his duties with the proficiency necessary to justify the awarding of the benefits he sought in order to establish his prima facie case. Instead, he need only present evidence that he was minimally qualified for such benefits; that is, he need only present evidence that with his qualifications, he could have been given the benefits he seeks.

Plaintiff has presented evidence that he has served as an associate professor for Tulane since 1987 and was granted tenure in 1990. The rank of associate professor is defined in the Tulane Faculty Handbook as follows:

> Associate Professor:
> Appointment to this rank is accorded to an individual who has attained scholarly distinction of high quality as demonstrated by teaching and by published scholarly work. Both areas of accomplishment are essential: High achievement in one cannot compensate for deficiencies in the other. Other service to the University will serve as strong support for the evidence of quality provided by the candidate's teaching and publication record.

(Exhibit 1 attached to defendant's Memorandum in Support of Motion for Summary Judgment). The rank of full professor is defined as follows:

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> Professor:
> Appointment to the Rank of Professor is made not merely on the basis of the rank of service but in recognition of outstanding quality. The title signifies that the holder is a mature scholar of distinguished achievement who has won national or international standing in his or her field and a successful teacher with a record of service to the University.

Id. Because the plaintiff is already a tenured associate professor and there is no set minimal length of service for a full professorship, plaintiff has presented evidence from which a reasonable jury could find that he is minimally qualified for the rank of full professor. Likewise, because the elevation of an associate professor's periodic increase in pay is not tied to any set formula which includes a minimal length of service, and indeed, may outpace that of a full professor,[10] the plaintiff has presented evidence from which a reasonable jury could find that he is minimally qualified for an elevated pay increase. Accordingly, plaintiff has presented evidence sufficient to establish the qualification element of his prima facie case.

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10. Attached as exhibit 17 to the defendants' Memorandum in Support of their Motion for Summary Judgment are several memoranda in which defendant Mike Lynch, Chairman of the Mechanical Engineering Department at Tulane recommends varying percent salary increases for the professors and associate professors in that department. These memoranda indicate that there is no single set of criteria for recommendations for raise increases and that the percent raise recommended varies based upon a number of criteria that the Chairman of the Department finds significant.

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b. *Differential Treatment*

The defendants argue that plaintiff has failed to present evidence that the denial of these benefits, full professorship and elevated pay increases, was differentially applied to the plaintiff. Plaintiff presents evidence that in fact other associate professors in his department were promoted to the position of full professor during plaintiff's tenure and that other professors and associate professors received higher pay increases. (Exhibits 26 & 33 Attached to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment). Specifically, plaintiff presents evidence that, of all of the raises given to faculty members of the Mechanical Engineering Department, his was the lowest percent raise. Accordingly, plaintiff has presented evidence sufficient to establish the differential treatment element of his prima facie case.

2. *LEGITIMATE NON-DISCRIMINATORY REASON*

Once a plaintiff presents evidence sufficient to establish a prima facie case of discrimination, the defendant bears the burden of producing a legitimate, non-discriminatory reason for its actions. *E.g.*, *Messer v. Meno*, 130 F.3d 130, 137 (5th Cir. 1997). Defendants present evidence that plaintiff's teaching skills, university citizenship, and relations with students were inadequate to warrant the promotion to full professor or to warrant higher pay raises. Defendants present a copy of a memorandum from Hugh Thompson, Dean of Engineering, to Dr. Francis Lawrence, Academic Vice President and Provost, dated December 6, 1989, which recommends plaintiff for the award of tenure, but with the

express reservation concerning plaintiff's teaching abilities in introductory courses. (Exhibit 7 Attached to Defendants' Memorandum in Support of Defendants, Motion for Summary Judgment). Defendants also present a copy of a memorandum to plaintiff from Professor Michaelides, Head of the Mechanical Engineering Department, dated October 28, 1991, in which Professor Michaelides notes that he will not support plaintiff's application for full professorship on the basis that plaintiff's teaching abilities, student evaluations of those abilities, and plaintiff's relations with students, did not warrant promotion. (Exhibit 9 Attached to Defendants, Memorandum in Support of Defendants' Motion for Summary Judgment).

Defendants also present a memorandum to plaintiff from Professor Paul Lynch, Department Chairman, dated April 29, 1994, in which Professor Lynch sets forth the results of an informal evaluation of plaintiff's request for promotion conducted by a faculty committee in the Fall of 1993. (Exhibit 11 Attached to Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment). In this memorandum, Professor Lynch states that plaintiff's teaching skills were not sufficiently proficient to warrant promotion to full professor. This memorandum also contains an analysis of student surveys and how the average responses to student surveys of plaintiff compared to the averages of the department. Defendants also present a memorandum from Professor Lynch to William C. Van Buskirk, Dean of the School of Engineering, dated January 31, 1995, setting forth the results of the review of plaintiff's application for full professorship by the Promotion and Tenure Committee of the Department of Mechanical Engineering and noting that

the application was denied on the basis of plaintiff's relations with others, both faculty and students, and his teaching abilities as reflected in student surveys. (Exhibit 12 Attached to Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment). Defendants also present a memorandum from Professor Michaelides to Professor Van Buskirk, dated February 8, 1996, which discusses the results of the Promotion and Tenure Committee of the Department of Mechanical Engineering meeting of 1996 and the reasons for its recommended denial of the plaintiff's application for full-professorship, citing plaintiff's failure to mentor doctoral students and the committee's mixed evaluations of plaintiff's teaching abilities. (Exhibit 13 Attached to Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment). Defendants also present a memorandum from Professor Michaelides to Professor Van Buskirk, dated January 17, 1997, which discusses the results of the Promotion and Tenure Committee of the Department of Mechanical Engineering meeting of 1997 and the reasons for the recommended denial of the plaintiff's application for tenure, citing plaintiff's continued failure to mentor doctoral students and the plaintiff's inadequate teaching abilities. (Exhibit 13 Attached to Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment). In addition, the defendants submit the deposition testimony of Professors Lynch, Michaelides, Mehrabadi and Watts, all of which state that plaintiff's teaching abilities played a significant part in the denial of plaintiff's request for promotion. These depositions also stress that plaintiff's alleged lack of collegiality, and therefore his lack of university citizenship, played a large role in their challenged decisions. (*See also* Exhibit 9 attached to defendants'

Memorandum in Support of its Motion for Summary Judgment). Through these exhibits and depositions, defendants have met their burden of producing a legitimate, non-discriminatory reason for failing to promote plaintiff and for failing to give plaintiff an elevated increase in salary — plaintiff's inadequate teaching skills and his poor student relations and university citizenship.

3. *PRETEXT*

Once a defendant presents a legitimate, non-discriminatory reason for its actions, the plaintiff then bears the burden of producing evidence that the proffered reason is pretextual and ultimately, that discrimination was a motivating factor in the defendant's decision. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747-48 (1993). "Pretext is established by a direct showing that a discriminatory reason more likely motivated the employer or by an indirect showing that the employer's explanation is not credible." *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 342-43 (6th Cir. 1997).

Plaintiff argues that defendants' proffered reasons are pretextual because the two committees charged with evaluating the plaintiff's applications were comprised of similar members, his ability to mentor students and thereby improve his student relations was hampered by the defendants, and the evaluations upon which his teaching skills were assessed had been tampered with.

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a. *Mixed committee membership*

Plaintiff argues that a member of the Executive Committee of the School of Engineering also was a member of the school-wide Tenure and Promotion Committee, in violation of eligibility requirements for serving on the Tenure and Promotion Committee. Plaintiff does not specifically delineate where this policy disallowing membership on both committees is memorialized nor the role that this alleged violation of policy played in harming the plaintiff. Assuming this policy existed and was violated, this violation does not in any manner tend to establish that defendants' proffered reasons, i.e. poor relations and university citizenship and inadequate teaching ability, are a pretext for discrimination.

b. *Relations and university citizenship*

Plaintiff argues that several other persons prevented plaintiff from improving his relations with students and his university citizenship; therefore, defendants' explanation that its decision to deny plaintiff the benefits he sought was based on plaintiff's poor student relations and poor university citizenship is pretextual. Specifically, plaintiff claims that he did not participate in department committees because Professor Lynch failed to assign plaintiff committee responsibilities in 1992 and 1993 and that, after these years, plaintiff had to specifically request committee assignments. (Plaintiff's Affidavit at p. 7). Plaintiff also claims that Professor Lynch thwarted plaintiff's attempts to participate in committee work by failing to secure funding for seminars after plaintiff was assigned as chairman of a seminar committee. Further, plaintiff claims that he was unable to

mentor students because the department in which he worked failed to offer teaching assistant positions to applicants in plaintiff's field of expertise. *Id.* at 7-8.

In evaluating a motion for summary judgment, evidence is viewed in the light most favorable to the non-movant. If believed, plaintiff's testimony establishes that his ability to improve relations among students and mentor students was impeded by the defendants themselves. Thus, a reasonable jury could find that defendants' proffered legitimate, non-discriminatory reasons — plaintiff's poor relations with students and failure to mentor students — were not credible. Accordingly, plaintiff has presented evidence from which a reasonable jury could find that these proffered reasons for denying plaintiff the benefits he sought — that plaintiff's university citizenship and student relations were low — were pretextual.

c. *Teaching skills*

Plaintiff argues that the student evaluations used in measuring his teaching abilities were miscalculated and selectively employed; therefore, defendants' proffered explanation that plaintiff was denied the benefits he sought because of his inadequate teaching skills was pretextual. Plaintiff states in his affidavit attached to his Memorandum in Opposition to defendants' Motion for Summary Judgment:

> 20. His student evaluation scores have been improving overall throughout the years. Initially he had relatively poor scores. However, when he first arrived at Tulane, he did not allow open book

tests or formula sheets during exams, whereas his colleagues in the department did. This practice was not received well by the students. He thereafter allowed the students to bring formula sheets and immediately and dramatically his student evaluation scores improved.

21. The average of the 229 evaluations handed in by students of plaintiff during the last five years for question 16/26 is 2.1 ("2" meaning good), Thirty-two percent of these students rated him as "1", meaning excellent, and forty-two percent rated plaintiff as "2", meaning good. Fourteen percent of these students rated him as "3", meaning average. Nine percent of these students rated him as "4", meaning fair. Two percent of these students rated him as "5", meaning poor. (The total is 99% instead of 100% because the numbers are rounded off).

22. In 1992, plaintiff discovered that there was a mistake in the tabulation of his scores because the Dean's office reported receiving more evaluations than the number of students who registered and attended the class. The dean's office showed that he had a 1.4 average rating for a course he taught, when actually his average was better — a 1.3. The Dean's executive secretary, Linda Miller, claimed that the error was caused by mistakenly including a student evaluation from another professor's course in plaintiff's course evaluations.

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23. In January 1996, plaintiff reviewed his evaluations prior to the Dean's office tabulations. The Dean's office made copies at plaintiff's request. The average response was 1.5. However, when the Dean's office's tabulations were communicated to plaintiff, the score was 1.6, a worse score. The original evaluations retained by the Dean's office are missing one evaluation form, on which a student gave plaintiff the highest score of "1" on question 16/26; instead, there is one additional evaluation with a score of "2". The total number of student evaluations in the file did not change. This had the effect of slightly lowering plaintiff's average for the course.

24. In the Spring of 1995, he noticed that "Rubinstein" was written on top of an evaluation form in the hand writing of the Dean's Secretary. Plaintiff recognized the writing to be the same as the writing that appeared routinely on memoranda that he had received from the Dean's office. He compared the handwriting to the handwriting of the students in the class and there was no match. He compared the handwriting to handwriting on several memoranda from the Dean's office and the handwriting matched that of the Dean's secretary. The student evaluation on which this writing appears is negative.

25. Additionally, for several years plaintiff conducted his own student evaluation survey on the same day as the Dean's office conducted the

> survey. Usually the results of this unofficial survey very closely correlate with the results of the Dean's office survey, both in the numerical average and in the handwritten comments. Plaintiff uses the same form as the Dean's office. However, in the fall of 1996, there is a significantly higher (worse) numerical average for question 26/16 on the Dean's set of evaluations as compared to the set of evaluations collected by plaintiff. Additionally, unlike in previous years, many of the students' comments on the unofficial set did not appear in the Dean's set of evaluations.

Viewed in a light most favorable to the non-movant, plaintiff's testimony may lead a reasonable jury to conclude that a few of his evaluations were altered and/or tampered with. However, plaintiff's testimony does not tend to establish that the evaluation scores he would have received but for the alleged tampering were sufficient to establish that his teaching skills were in fact adequate to warrant a promotion to full-professor and a higher salary. At most, plaintiff's testimony establishes only that in a few isolated instances his student evaluation scores in certain classes might have been higher. Plaintiff's testimony does not tend to establish that the change in his scores would have substantially changed the broader analysis of his overall teaching abilities. Thus, plaintiff has failed to establish that defendants' explanation that plaintiff's teaching skills were insufficient to warrant these benefits is pretextual.

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4. *DISCRIMINATION*

Evidence of discriminatory animus lies at the heart of a discrimination claim. An analysis of plaintiff's evidence of discriminatory animus is therefore appropriate. Plaintiff argues that the true bases for the defendants' refusal to promote him to the position of full professor and refusal to grant him an increase in pay are plaintiff's religion and national origin. In *Walton v. Bisco Indus., Inc.*, 119 F.3d 368 (5th Cir. 1997), the Fifth Circuit noted that:

> The plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993). Rather, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* (emphasis in original).

Walton, 119 F.3d at 370 (footnote omitted).[11] Thus, in addition to presenting evidence that defendants' proffered

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11. In *Bodenheimer v. PPG Indus.*, 5 F.3d 955 (5th Cir. 1993), the Fifth Circuit discussed the disarray in the circuits prior to the *Hicks* decision, stating:

> Prior to the Supreme Court's recent decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), confusion reigned among the circuit courts as to whether the plaintiff could prove

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> employment discrimination simply by showing that the defendant's reasons were not credible. *See St. Mary's*, 509 U.S. at __, 113 S.Ct. at 2750. The Court in St. Mary's put the issue to bed. To prevail ultimately, the plaintiff must prove, through a preponderance of the evidence, that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was. *St. Mary's*, 509 U.S. at __, 113 S.Ct. at 2747.

Bodenheimer, 5 F.3d at 957. Subsequently, in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), a case brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, the Fifth Circuit discussed the following language found in *St. Mary's*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination, . . . and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.'

See Rhodes, 39 F.3d at 542 n.5 (discussing the above quote from *St. Mary's*, 113 S.Ct. at 2749). In *Rhodes*, the Fifth Circuit concluded that this language was dicta to the extent that it suggested that a plaintiff need not present any evidence beyond his prima facie case and evidence that the defendant's proffered reason for taking action was pretextual, in order to succeed on a discrimination claim. *Id.* at 542-43. Judge Emilio M. Garza dissented, noting that six other circuits have interpreted this language as holding that rejection of the defendant's proffered reasons for its actions, coupled with the presentation of a prima facie case, is sufficient evidence from which a reasonable jury may find in favor of a plaintiff. *Id.* at 549-51.

(Cont'd)

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(Cont'd)

The Fifth Circuit granted a rehearing en banc, and on rehearing, discussed the above quoted language of *St. Mary's*, stating:

> It is unclear, however, whether the Court intended that in all such cases in which an inference of discrimination is permitted a verdict of discrimination is necessarily supported by sufficient evidence. We believe that the question does not yield a categorical answer. Rather, we are convinced that ordinarily such verdicts would be supported by sufficient evidence, but not always. The answer lies in our traditional sufficiency-of-the-evidence analysis. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2305 (1995) (noting that "the Court stressed in *Hicks* that once a *McDonnell Douglas-Burdine* case reaches the pretext stage, it is to be treated like any other civil case."). We test jury verdicts and motions for summary judgment for sufficiency of the evidence under the *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), standard. Under *Boeing*, "[t]here must be a conflict in substantial evidence to create a jury question." *Id.* at 375. Substantial evidence is defined as "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.* at 374. Consequently, "[a] mere scintilla of evidence is insufficient to present a question for the jury." *Id.* Even if the evidence is more than a scintilla, "*Boeing* assumes that some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield to a directed verdict." *Neely v. Delta Brick and Tile Co., Inc.*, 817 F.2d 1224, 1226 (5th Cir. 1987).
>
> FN4. The standard for granting a Rule 56 motion for summary judgment or a Rule 50 motion for judgment

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explanations for their action are pretextual, plaintiff must also present evidence that his religion or national origin were a motivating factor in the decision to take action. *See* 42 U.S.C. § 2000e-2(m).[12]

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> as a matter of law is the same. Consequently, the presence of a jury verdict on the renewal of a Rule 50 motion should make no difference to the inquiry. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).
>
> Our *Boeing* analysis applies to circumstantial as well as direct evidence. Because direct evidence is rare in discrimination cases, a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion. *See Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994). Thus, this circuit has held repeatedly that a plaintiff need not provide direct evidence to sustain a jury finding of discrimination. *See, e.g., Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 751 (5th Cir. 1989). Similarly, *Hicks* does not cast aside circumstantial evidence as a means of allowing a factfinder to infer discrimination.

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc).

12. This section provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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Plaintiff presents evidence that Dr. Watts, who served as a member of the Promotion and Tenure Committee of the Department of Mechanical Engineering during 1995, 1996 and 1997,[13] as chair of that committee in the latter two years, and as a member of the School of Engineering Committee on Promotion, Tenure and Third-Year Review during the latter two years, made several disparaging remarks to plaintiff. Specifically, plaintiff presents the affidavit of Professor Watts which contains the following exchange:

> Q: During your conversation with Professor Rubinstein over the years do you recall ever referring to him as a Russian Yankee?

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13. In 1995, the Promotion and Tenure Committee of the Department of Mechanical Engineering consisted of Professors Lynch, Thompson, Mehrabadi, Watts, and Michaelides, and the School of Engineering Committee on Promotion, Tenure and Third-Year Review consisted of Professors Buckles, Gonzalez, Papadopoulos, Bundy, Mehrabadi, Duvoisin, and Nunez. (Exhibit 12 Attached to Defendants' Memorandum in Support of their Motion for Summary Judgment). In 1996, the Promotion and Tenure Committee of the Department of Mechanical Engineering remained the same and the School of Engineering Committee on Promotion, Tenure and Third-Year Review consisted of Professors Watts, Nunez, Hsieh, Niklaus, John, Buckles, and Walker. (Exhibit 13 Attached to Defendants' Memorandum in Support of their Motion for Summary Judgment). In 1997, the Promotion and Tenure Committee of the Department of Mechanical Engineering consisted of Professors Lynch, Mehrabadi, Watts, and Michaelides, with Professor Mehrabadi not participating due to sabbatical leave, and the School of Engineering Committee on Promotion, Tenure and Third-Year Review consisted of Professors Watts, Nunez, Hsieh, Bruce, Bundy, Papadopolous, and Petry. (Exhibit 14 Attached to Defendants' Memorandum in Support of their Motion for Summary Judgment).

A: Not-Not that specifically, no. We used to badger each other at lunch when he used to come to lunch with us. And he used to call me a hillbilly or hick or something, and I used to call him a commie. I don't recall calling him a Russian Yankee, but its entirely possible.

Q: Okay. Did Dr. Rubinstein ever express to you any displeasure at being referred to as a commie or any other way relating to his Russian origins.

A: No. I had never said anything to Asher that I considered insulting or that I thought he considered insulting. It was just joking around. I'm sorry. He didn't call me a hillbilly. He called me a redneck. That was the word he used.

(Affidavit of Robert G. Watts attached as exhibit 27 to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at p. 15-16). Plaintiff also presents his testimony given by way of deposition which contains the following exchange:

Q: What comments do you remember Professor Watts making?

A: Well, at some point, like in Spring '94, I believe he start to make comments about Jews.

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Q: Watts made comments about Jews?

A: About Jews, yes —

Q: Do you remember any?

A: — about Jews, about Jewish rituals. An what was your question?

Q: Do you remember any of the comments that he made?

A: Well, he was particularly upset about his daughter getting married to a Jew and that he would have to attend wedding with some Jewish rituals in it, and I mean, it was only one for a few months, and a large number of comments like this, and at the same time, he was making jokes about his first wife happened to be Jewish, and so his children a quarter Jewish, and he made jokes about that, too.

Q: He made jokes about his own children?

A: Yes, he said that his — one of these jokes kind of imprinted in my mind. He said that his children are a quarter Jewish but all three-quarters went to one girl, [ ], because she's tight with money.

Q: Okay. These comments by Professor Watts all took place in the Spring of 1994, as far as you remember?

A: These kind mostly, yes.

Q: Did you say anything in response to these comments?

A: No, I didn't want to raise confrontation. I just eventually stopped going to these lunches.

Q: Do you remember any other comments about religion or national origin?

A: About —

Q: — by Professor Watts

A: About the period maybe a little later, he consistently start calling me Russian Yankee.

Q: Russian Yankee?

A: Russian Yankee, yes, because I'm Russian, and I came from New York. Russian Yankee. And everything happened in Russia, negative, for something that could be ridiculous, he always would bring it up to me and kind of —

Q: In a joking manner or not?

A: No, it was not a joking manner. He used to joke about my accent before, which I kind of used to dismiss as a joke or something, but at some point, it came out kind of — I could

see that he really irritated by all this. He consistently pretend that he could not understand me because of my accent and make these remarks, and like every time he would go to meeting, and it would be somebody from Russia, and if there was anything ridiculous to say, he would tell it.

Q: Wait. Say that again. If he went to a meeting and there was somebody from Russia —

A: From Russia, and it was — if it was anything kind of ridiculous to comment about it, he would do it to me.

Q: Okay. And did you ever say anything to him about that? That you didn't appreciate those comments or anything?

A: I mentioned to him that I kind of not responsible for what's going on in Russia for a long time already.

(Affidavit of Asher Rubinstein attached as exhibit 28 to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at p. 78-80) (omission added).

Plaintiff also presents an unsigned memorandum, which Professors Watts, Lynch and Michaelides admit preparing, in which the following statements are made:

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1. We agree that recruiting underrepresented minorities and women to serve on the Engineering School faculty if [sic] a positive thing. In particular, this would aid in the recruitment of students, especially graduate students, from the pool of women and under represented minorities. We have always welcomed and will continue to welcome, applications from all who wish to apply for faculty positions, regardless of race or gender.

2. There has been considerable progress in the Engineering School in hiring women professors and graduate students.

3. In 1991, 8.96% of new Engineering PhDs were women and 2.33% were African Americans. 2.98% were Hispanic and .26% were Native Americans. Our faculty employs 4 (15.4%) women and 4 Hispanics (15.4%). There are currently no African or Native Americans.

4. 55 African Americans (2.33%) and 452 women (9%) received PhDs in Engineering in 1991. Almost all of them were heavily recruited by the most prestigious schools in the country. They serve both their constituencies and their own self-interests best by accepting positions at these universities. We do not help either their cause or their careers by enticing them to come to Tulane.

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5. In any case, we would have to pay a premium salary to entice them, especially African Americans to come to Tulane. During a time of severe budget cuts this would no doubt lead to discontent among the current faculty.

6. Since so few women and (especially) African Americans pursue PhD degrees in Engineering, the School of Engineering would have a much more difficult time recruiting them than many departments in LAS. Under the current plan we would stand a good chance of losing faculty lines to LAS departments. Pitting faculties against faculties in this manner is particularly poor practice when budget cuts have already caused tension among departments.

7. The various departments in the School of Engineering are already severely stressed. All departments are at or even below a bare minimum of critical mass.

Therefore we, the Faculty of the School of Engineering, view the action of the President and Provost as coercive, conceived in order to further their own socio-political interests, and destructive to the educational purposes of the School of Engineering and of Tulane University.

(Exhibit 29 attached to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment).

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Plaintiff presents the deposition testimony of Professor Van Buskirk, in which Professor Van Buskirk claims that another associate professor, Reda Bakeer, complained that Professor Bruce may have discriminated against him in his application for a promotion and that Professor Bruce had called him an "Arab." (Exhibit 10 attached to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at pp. 18 & 222)). Plaintiff also states in his Memorandum in Opposition to defendants' Motion for Summary Judgment:

> Dr. Bruce also told Dr. Bakeer that he didn't have to worry about getting tenure because if the Russian Jew (a reference to plaintiff) in Mechanical Engineering could obtain tenure, anyone at Tulane could.

(Memorandum in Opposition to Defendants' Motion for Summary Judgment at p. 26).[14] Plaintiff also attaches a copy

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14. Plaintiff fails to cite the evidence from which this statement is taken. The deposition of Dr. Thompson discusses Professor Bakeer's complaint, but only in general terms. (Deposition of Professor Hugh Thompson attached as exhibit 14 to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at pp. 88-91). Plaintiff also states in his Memorandum in Opposition:

> In the Spring of 1995, Dr. Lynch told Professor Rubinstein that he would not hire a highly qualified Chinese student as a teaching assistant because he didn't want 'some Chinese guy running the lab (paraphrase)'.

(Memorandum in Opposition to Defendants' Motion for Summary Judgment at pp. 28-29). Plaintiff fails to cite the evidence from which this statement is taken.

of an offensive cartoon which Professor Bruce allegedly brought to a faculty meeting. (Exhibit 47 attached to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment). Plaintiff also presents the deposition testimony of Professor Mehrabadi, which notes that Professor Mehrabadi once stated that he had read an article which stated that Israeli secret police had trained the former Shah of Iran's secret police. (Deposition of Professor Mehrabadi attached as exhibit 44 attached to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at pp. 39-40).

Most of the evidence presented by the plaintiff is irrelevant to the question of whether plaintiff was discriminated against on the basis of his national origin or religion. The memo discussing hiring practices of racial and gender minorities expresses an opinion on the school's affirmative action policies and is neither expressly or impliedly racist or sexist in nature. Moreover, even if this memorandum were interpreted as expressing hostility toward African-Americans, Hispanics, Native Americans or women, the plaintiff is not a member of any of these classes. This memorandum is irrelevant to plaintiff's claims of discrimination based on his Judaism and his national origin.

For similar reasons, the alleged statements by Professor Bruce concerning "Arabs" and the offensive cartoon allegedly displayed by Professor Bruce at most express hostility toward persons of Arabian descent — a class to which plaintiff is not claiming membership. Therefore, these alleged remarks and this cartoon are irrelevant to plaintiff's claims of discrimination based on his Judaism and national origin.

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The statement of Professor Mehrabadi concerning the fact that he had read that Israeli secret police trained the Shah of Iran's secret police does not express any form of animus based on plaintiff's religion. The statement reflects the fact that Professor Mehrabadi repeated that a story was published which claims that Israeli secret police trained the Shah of Iran's secret police and does not in itself express any form of animus. Thus, this statement is not relevant to the question of whether plaintiff has been discriminated against on the basis of his religion or national origin.

The remaining evidence consists of the alleged statements of Professor Watts referring to plaintiff as a "Russian Yankee" and relaying a joke suggesting that Jewish persons are thrifty, and the claim in plaintiff's Memorandum in Opposition that Professor Bruce remarked that, if "the Russian Jew" could attain tenure, then anyone could. In *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), a case involving an allegation of age discrimination in an employment termination, the Fifth Circuit noted that to serve as sufficient evidence of discrimination, the comments must be:

1) age related;

2) proximate in time to the terminations;

3) made by an individual with authority over the employment decision at issue; and

4) related to the employment decision at issue.

Brown, 82 F.3d at 655 (citing *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992)). This four-step

inquiry has subsequently been adapted by other district courts in evaluating comments upon which other types of employment discrimination claims have been based. *See, e.g., Warren v. Blockbuster Music*, Civil Action No. 96-1018, 1997 WL 47780 at *5 (E.D.La. Feb. 6, 1997) (Berrigan, J.) (applying the four-step analysis set forth in *Brown* to an employment discrimination case involving allegations of race and sex discrimination), *aff'd*, 132 F.3d 1456 (5th Cir. 1997). Applying this four-step inquiry to the facts in the present case, plaintiff must establish that (1) the statements made by Professors Bruce and Watts were related to plaintiff's religion or national origin; (2) they were made in proximate time to the decisions not to grant plaintiff a full-professorship or a pay raise; (3) Professors Bruce and Watts had authority over these decisions; and (4) the statements were related to these decisions.

The statements allegedly made by Professors Bruce and Watts were related to plaintiff's religion and national origin and Professors Bruce and Watts both served on committees which decided not to grant plaintiff a full- professorship or a larger pay raise. However, plaintiff has failed to present evidence that these statements were made in proximate time to these decisions or that these statements were related to the decisions concerning plaintiff's application for a full-professorship or pay raise.

5. *CONCLUSION*

Plaintiff has failed to present evidence from which a reasonable jury could find that defendants discriminated against him on the basis of his religion or national origin in failing to grant him a full-professorship or a higher salary.

Accordingly, defendants are entitled to summary judgment on plaintiffs' state law and federal law discrimination claims.

D. *RETALIATION CLAIMS*

Defendants argue that they are entitled to summary judgment on plaintiffs' retaliation claim. Section 2000e-3(a) of Title 42 of the United States Code provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The same burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973), used in employment discrimination claims is used in claims of unlawful retaliation. *See McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983). In *Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996), the Fifth Circuit noted that to establish a prima facie case of unlawful retaliation, a plaintiff must present evidence that:

> (1) that [the plaintiff] engaged in activity protected by Title VII;
>
> (2) that an adverse employment action occurred; and
>
> (3) that a causal link existed between the protected activity and the adverse employment action.

Long, 88 F.3d at 304 (alteration added). The Fifth Circuit went on to explain that:

> once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the defendant introduces evidence which, if true, would permit the conclusion that the adverse employment action was nondiscriminatory, the focus shifts to the ultimate question of whether the defendant unlawfully retaliated against the plaintiff.

Id. at 304-305 (internal citations omitted).[15]

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15. The Fifth Circuit also noted:

> At first glance, the ultimate issue in an unlawful retaliation case — whether the defendant discriminated against the plaintiff because the plaintiff engaged in conduct protected by Title VII — seems identical to the third element of the plaintiff's prima facie case — whether a causal link exists between the adverse

(Cont'd)

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(Cont'd)

> employment action and the protected activity. However, the standards of proof applicable to these questions differ significantly. The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a "but for" cause of the adverse employment decision. *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985). In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct. *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1131 (5th Cir. 1984). The standard for establishing the "causal link" element of the plaintiff's prima facie case is much less stringent. *See McMillan*, 710 F.2d at 1116-17 (holding plaintiff's evidence sufficient to meet causation element of prima facie case but insufficient to prove ultimate question of "but for" causation). The Eleventh Circuit has recognized this distinction explicitly, holding that a plaintiff may satisfy the "causal link" element of his prima facie case by showing that the protected activity and the adverse employment action "were not wholly unrelated." *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir.), *cert. denied*, 474 U.S. 981, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985). Though we need not today adopt the Eleventh Circuit's approach, we do note that a plaintiff need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish the "causal link" element of a prima facie case. *De Anda v. St. Joseph Hosp.*, 671 F.2d 850, 857 n.12 (5th Cir. 1982).

Long, 88 F.3d at 305 n.4.

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In the present case, it undisputed that plaintiff has engaged in an activity protected by Title VII — filing a claim with the EEOC and subsequently filing a claim of unlawful discrimination. It is also undisputed that an adverse employment decision occurred — plaintiff was denied pay raises and full-professorship. The parties dispute, however, whether there is a causal link between plaintiff's engaging in a protected activity and the adverse employment decision, whether defendants have presented a legitimate non-discriminatory reason for the decision, and ultimately, whether plaintiff has presented evidence of unlawful retaliation. As previously noted in the analysis of plaintiff's discrimination claims, defendants have presented legitimate, non-discriminatory reasons for refusing to give plaintiff the pay raise and full-professorship plaintiff sought. Therefore the only remaining questions are the related issues of whether plaintiff has presented evidence of a causal link between plaintiff's engaging in a protected activity and the adverse employment decision and whether plaintiff has presented evidence of unlawful retaliation.

Plaintiff claims that, in response to plaintiff's inquiry regarding a memorandum sent from plaintiff, Professor Van Buskirk stated "What — are you going to sue me? Do you know what happens to people who sue their employer?" Plaintiff also presents the deposition testimony of Professor Van Buskirk which contains the following exchange regarding the refusal to give plaintiff a pay raise for the 1997-98 year:

> Q: And I take it that there are some negative aspects of his performance for that year that you considered?

A: Yes.

Q: And can you tell me what the negative aspects are that you considered in making that recommendation?

A: Well, in the Fall of '96 he got the worst teaching evaluations in the school, reverting to form. And, in my opinion, he's a very poor university citizen.

Q: And what actions or failure to act regarding university citizenship did you take into account?

A: I've tried to convey in my deposition this concept we have of a community of scholars. Citizenship refers to one's membership in that community. In asking whether someone is a good citizen, you ask the question: Is that person a colleague? A good college has certain characteristics which I think Professor Rubinstein fails to exhibit.

A colleague, when disturbed by another colleague's remarks is to go to that person in private and talk it through and say: I don't know if you're aware of this, but what you're saying hurts my feelings, and I wish you would be more sensitive about that. He doesn't have a lawsuit about it.

A good colleague who's part of a community uses the resources of the

> community to resolve differences. He doesn't use external resources. He doesn't haul colleagues into court to try to resolve differences.
>
> A good colleague doesn't lead his attorney down a path of systematically destroying his relationships with his colleagues in the department with these invidious distinctions and comparisons.
>
> . . . .
>
> All of that suggests to me that he is a very poor university citizen.

(Deposition of William C. Van Buskirk attached as exhibit 10 to plaintiff's Memorandum in Opposition to defendants' Motion for Summary Judgment at pp. 229-30). Thus, plaintiff has presented evidence from which a reasonable jury could find that not only was there a causal link between defendants' actions and plaintiff's protected activity, but that plaintiff's protected activity was a motivating factor in defendants' actions. Accordingly, defendants are not entitled to summary judgment on plaintiff's retaliation claim.

E. *INDIVIDUAL CAPACITIES*

Defendants argue that Professors Lynch and Van Buskirk cannot be held liable in their individual capacities on plaintiff's claims. In *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir.), *cert. denied*, 115 S.Ct. 574 (1994), the Fifth Circuit held that Title VII does not permit the imposition of liability

upon individuals acting on behalf of another entity, unless they themselves meet the definition of an "employer" within the meaning of Title VII. *Grant*, 21 F.3d at 653. Plaintiff acknowledges the applicability of *Grant* but argues nevertheless that *Grant* should be overruled. This court may not "overrule" the precedent established by the Fifth Circuit and declines plaintiff's invitation to do so. Accordingly, defendants Lynch and Van Buskirk are entitled to summary judgment on plaintiff's remaining viable claim — his retaliation claim — to the extent that plaintiff seeks to impose liability on these defendants in their individual capacity.

F. *CONCLUSION*

In sum, defendants are granted summary judgment on all of plaintiff's federal-law and state-law national origin and religious discrimination claims. Defendants are also granted summary judgment on all of plaintiff's federal-law and state-law claims, including both discrimination claims and retaliation claims, against defendants Paul Michael Lynch and William C. Van Buskirk in their individual capacities. Defendants are denied summary judgment on plaintiff's federal-law and state-law retaliation claims against Tulane and against Paul Michael Lynch and William C. Van Buskirk in their official capacities.

New Orleans, Louisiana, this 6 day of March, 1998.

s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX G — JURY INTERROGATORIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED APRIL 3, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-3343
SECTION "S"

ASHER RUBINSTEIN

VERSUS

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, WILLIAM LYNCH & WILLIAM C. VAN BUSKIRK

JURY INTERROGATORIES

1. Do you find by a preponderance of the evidence that Asher Rubinstein's filing of a discrimination lawsuit and/or EEOC charge was a motivating factor in Tulane's decision to deny Asher Rubinstein a pay raise in 1997-98?

✓	
YES	NO

[If your answer to question number one is yes, proceed to question number two. If your answer to question number one is no, have the presiding juror sign and date the verdict form and return to the courtroom]

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2. Do you find by a preponderance of the evidence that Tulane also had a legitimate, non-retaliatory motive for the denial of the 1997-98 pay raise?

✓	
YES	NO

[If your answer to question number two is yes, proceed to question number three. If your answer to question number two is no, proceed to question number four.]

3. Do you find by a preponderance of the evidence that Tulane would have made the same decision to deny Asher Rubinstein a raise despite the existence of a retaliatory motive?

	✓
YES	NO

[If your answer to question number three is yes, have the presiding juror sign and date the verdict form and return to the courtroom — the court will make the proper assessment of the elements of recovery. If your answer to question number three is no, proceed to question number four.]

4. What amount of damages, if any, do you find that Asher Rubinstein has proved by a preponderance of the evidence that he suffered as a result of Tulane's decision to deny him a pay raise in 1997-98?

Lost wages and benefits	$2500.00
Emotional damage	$ 0

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5. Do you find by a preponderance of the evidence that Tulane acted with malice or with reckless indifference to the rights of Asher Rubinstein in denying him a pay raise in 1997-98?

✓	
YES	NO

[If your answer to question number five is yes, proceed to question number six. If your answer to question number five is no, have the presiding juror sign and date the verdict form and return to the courtroom.]

6. What amount of damages, if any, do you assign as punitive damages against Tulane?

$75,000.00

s/ [illegible]
PRESIDING JUROR

4-3-98
DATE

APPENDIX H — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED AUGUST 14, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30777

ASHER RUBINSTEIN

Plaintiff – Appellee-Cross-Appellant

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND; MICHAEL LYNCH; WILLIAM C. VAN BUSKIRK

Defendants – Appellants-Cross-Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITIONS FOR REHEARING AND
REHEARING EN BANC
(Opinion July 6 2000, 5 Cir., __, __ F.3d __)

Before BARKSDALE, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on

the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX I — RELEVANT STATUTES

42 U.S.C. § 1981a(b)(1)

§ 1981a. Damages in cases of intentional discrimination in employment

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

* * *

42 U.S.C. § 2002e-2(m)

§ 2000e-2. Unlawful employment practices

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the

complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-3(a)

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * *

Appendix I

42 U.S.C. § 2000e-5(g)(2)

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

* * *

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

(i) may grant declaratory relief, injunctive relief (except as provided in

clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * *

APPENDIX J — MEMORANDUM FROM WILLIAM C. VAN BUSKIRK, DEAN OF ENGINEERING, TO FACULTY IN THE SCHOOL OF ENGINEERING DATED MARCH 12, 1997

March 12, 1997

TO: Faculty in the School of Engineering

FROM: William C. Van Buskirk
Dean of Engineering

RE: Salary Increases

The pool for salary increases this year is 3.5% of our current salaries. As always, raises will be based on merit. In addition to recognizing and rewarding high-quality performance, the raise pool needs to be used to address inequities in the current distribution of compensation.

Last year, I compared our salaries to the 1995-96 national averages for engineering faculty. Our assistant professors' salaries were above their national average by 5.6%, our associate professors' salaries were above their national average by 3.8%, and our full professors' salaries were below their national average by 1.8%. Since then our assistant professors have received a raise of 5% while associate professors' and full professors' salaries remained frozen.

One of the principal reasons that full professor salaries at Tulane lag those at other institutions is that the University provides no raise associated with promotion to associate professor or professor. All one gets is his or her fair share of the raise pool that year. Over time this results in a salary that is lower than one's peers elsewhere.

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It is my intention to use much of the raise pool this year to address the problem we have with the salaries of full professors and some of our associate professors. Thus, assistant professors and well-paid associate professors should anticipate little or no raise. Those who receive no raise this year should not infer from that that their efforts are unappreciated. I hope they will recognize that we are allocating the few additional resources we have in a way that redresses current inequities and that fairness to full professors ultimately benefits them when they achieve that rank.

Next year, I anticipate that we will return to our normal mode of operation with respect to the granting of raises.